June 8 1877

Submitted

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 937.

THE INMAN STEAMSHIP COMPANY, (LIMITED,) APPELLANT,

vs.

EDWARD G. TINKER, ACTING CAPTAIN OF THE PORT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 The President of the United States of America to Edward G. [L. S.] Tinker, acting captain of the port of New York, greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit court, in equity, on the first Monday in December, A. D. 1876, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by the Inman Steamship Company, (Limited,) and to do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you of two hundred and fifty dollars.

Witness honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at the city of New York, on the 24th day of October, in the year one thousand eight hundred and seventy-six, and of the Independence of the United States of America the hundred and first.

JOHN I. DAVENPORT,
Clerk.

FRANCIS LYNDE STETSON,
Complt.'s Solr.

The defendant is required to enter appearance in the above cause in the clerk's office of this court on or before the first Monday of December, 1876, or the bill will be taken pro confesso against him.

J. I. D., *Clerk.*

2 I hereby certify that on the 28 day of October, 1876, at the city of New York, in my district, I personally served the within subpœna upon the within-named defendant, Edward G. Tinker, acting captain of the port of New York, by exhibiting to him the within original, and at the same time leaving with him a copy thereof. I further certify that, at the time and place above mentioned, I delivered to and left with said defendant a copy of the bill of complaint herein.

Dated November 10, 1876.

OLIVER FISKE,
U. S. Marshal, S. D. N. Y.

E. D. No. 8, p. 137.

Filed Nov. 10, 1876.

3 U. S. circuit court, southern district of New York.

THE INMAN STEAMSHIP COMPANY (LIMITED)
vs.
EDWARD G. TINKER, ACTING CAPTAIN OF THE port of New York.

Amended bill of complaint.

To the judges of the circuit court of the United States for the southern district of New York, in the second circuit:

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Inman Steamship Company, (Limited,) a corporation organized and existing under the acts of the Parliament of the United Kingdom of

Great Britain and Ireland, an alien and resident of England, Great Britain, and whose members are aliens and subjects of Great Britain, bring this their bill against Edward G. Tinker, acting captain of the port of New York, a citizen of the State of New York, and residing within said district.

And thereupon your orator complains and says that it is now, and has been since and before the first day of January, A. D. 1876, the sole owner of the following steamships, to wit:

The City of Berlin, of the burthen of twenty-nine hundred and fifty-six tons, or thereabouts;

The City of Richmond, of the burthen of twenty-eight hundred and twenty-three tons, or thereabouts;

4 The City of Chester, of the burthen of twenty-seven hundred and twelve tons, or thereabouts;

All belonging to the port of Liverpool, in England, and running between the port of Liverpool, in England, by way of the port of Queenstown, in Ireland, and port of New York, in the State of New York, and back to Liverpool by the same route.

That your orator on, before, and ever since the first day of January, A. D. 1876, was, and is now, engaged in running said vessels to and from said ports, carrying the United States mails, passengers, and freight for hire, such steamships arriving at this port on an average three times in every five weeks, or thirty-one times in each year.

That the said Edward G. Tinker, acting as captain of the port of New York, without any lawful authority, under the pretence of collecting fees or dues with which to compensate the captain of the port and the harbour-masters of the port of New York, by force and threats, has compelled your orator to pay for and on account of each steamer, each time it enters the port of New York, fees of one and one-half cents per ton for each and every ton of its measurement.

That such fees are exacted by the said Edward G. Tinker, acting as captain of the port of New York, for and in behalf of himself and the harbor-masters of the said port, whether or not any services are rendered to your orator by them or either of them, and whether or not any services are required of them by your orator.

5 That not only have the said fees heretofore been exacted from your orator, but the said Edward G. Tinker, acting as captain of the port of New York, threatens to continue said exactions at the said port whenever any of said steamships touch at the same, either in going or returning between Liverpool and the said port of New York.

That the sum paid by your orator alone upon such exactions amounts to upwards of one hundred and twenty-five dollars for every five weeks, or over thirteen hundred dollars per annum.

That the action of said defendant is pretended to be based upon an act of the legislature of the State of New York, passed May 22, 1862, entitled "An act defining and regulating the powers, duties, and compensation of the captain of the port and harbour-masters of the port of New York," as amended April 27, 1865, a copy of which amended act is hereunto annexed, marked "Exhibit A," and which your orator prays may be taken as part of this bill of complaint and used at the hearing of this cause.

That your orator is advised and believes that the said acts of the legislature, in all their various provisions, are invalid, as being in violation of the Constitution of the United States, and especially in violation of the provisions therein contained that the Congress shall have power to

regulate commerce, and that no State shall, without the consent of Congress, lay any duty of tonnage.

That under said acts of the legislature, such exactions will continue to be made by the said Edward G. Tinker, acting as captain of
6 the port, or his successors in office, and, unless relieved by your honors, your orator will have to pay yearly the amount of thirteen hundred dollars and upwards towards the support of the captain of the port and the harbour-masters of the port of New York, which is an onerous burden to commerce, oppressive and unjust towards your orator, and in violation of the Constitution of the United States.

That unless relieved by your honors from these oppressions, to which it is exposed so long as these laws of the State of New York are recognized as valid, your orator is, and will continue to be, deprived of the rights, privileges, and immunities from State legislation which are secured by the eighth and tenth sections of the first article of the Constitution of the United States.

And your orator further shows that if your orator, as owner of the said several ships, (three of which in every five weeks arrive at and enter the said port of New York, and load or unload and make fast to a wharf therein,) shall refuse to pay the fee, equal to one and one-half cents per ton, computed upon the tonnage of such vessels, the said defendant, acting as captain of the port, upon the expiration of forty-eight hours after the arrival of each and every of such vessels, will institute an action against your orator to recover double the amount of such fees, as prescribed by the laws of the State of New York, and will by warrant of attachment seize the said steamships of your said orator, as authorized so to do in and by said laws, and will put your orator to great trouble, inconvenience, and expense in procuring the redelivery
7 of said property when so attached, and thereby your orator will sustain actual and material injury.

That in case your orator shall refuse to pay the said fees or dues as aforesaid, your orator will be exposed to a multiplicity of suits or actions brought against your orator by the said defendant, the captain of the port.

In consideration whereof, and forasmuch as your orator is entirely remediless at common law, and can only have adequate relief in a court of equity, to the end, therefore, that the said Edward G. Tinker, acting as captain of the port, pretending to act under and by virtue of the said act of the legislature, may full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated, and that he may be enjoined and restrained by the orders and injunctions of this honorable court from collecting any further of said duties and fees hereinbefore mentioned, and that your orator may have such other and further relief in the premises as the nature of the case may require and to your honors shall seem meet:

May it please your honors to grant to your orator not only the writ of injunction prayed for, issuing out of this honorable court, to be directed to Edward G. Tinker, acting captain of the port of New York, to restrain him from proceeding under said acts of the legislature or from demanding or exacting from your orator, its captains, pursers, or agents, any duties, taxes, or fees on account of its said steamships herein enumerated touching any of the matters in question, but also a writ of subpœna, to be directed to the said Edward G. Tinker, acting captain of the port of New York, commanding him to be and appear within
8 the time prescribed by law to answer the premises and exigen-

cies of the bill, and to stand to, and abide by and perform, such orders and decrees therein as to your honors shall seem meet.

And your orator shall ever pray, &c.

THE INMAN STEAMSHIP COMPANY, (LIMITED,)
By JOHN G. DALE, *Agent.*

WM. C. WHITNEY,
Of Counsel.
FRANCIS LYNDE STETSON,
Solicitor.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John G. Dale, being duly sworn, deposeth and saith that he is agent and attorney in fact of the Inman Steamship Company, (Limited,) complainant in the foregoing bill of complaint, which is an alien corporation, created and existing under the acts of Parliament of the kingdom of Great Britain and Ireland, and out of the United States of America, and that the foregoing bill of complaint is in all respects true.

JOHN G. DALE.

Subscribed and sworn to before me this 18th day of November, 1876.

[L. S.] THOMAS PROCTOR,
Notary Public, New York County.

9 EXHIBIT A.

CHAPTER 487.—An act defining and regulating the powers, duties, and compensation of the captain of the port and harbor-masters of the port of New York, passed May 22nd, 1862, three-fifths being present. Amended April 27th, 1865.

The people of the State of New York, represented in the senate and assembly, do enact as follows:

SECTION 1. The governor shall appoint, by and with the consent of the senate, an officer to be called captain of the port of New York, and to assist him, subordinate to his directions, eleven harbor-masters. All of said harbor-masters shall reside, after their appointment and during their term of office, in the city of New York or in the city of Brooklyn. Said captain of the port or any of the harbor-masters shall not be directly or indirectly interested as owners or agents in any steam tow-boat, tug-boat, ship, vessel, canal-boat, barge, or lighter navigating the port of New York. Said harbor-masters shall hold their office two years, and said captain of the port shall hold his office three years, and until others are appointed, unless sooner removed for cause. Before entering on his duties, said captain of the port shall execute a bond to the people of this State in the penal sum of ten thousand dollars, with at least two sufficient sureties, to be approved by a justice of the supreme court, conditioned for the faithful performance of the duties of his office, and
10 the proper application of all fees and moneys that may come into his hands as such officer; and each of said harbor-masters shall execute a like bond in the penal sum of two thousand five hundred dollars, conditioned for the faithful performance of the duties of his office. Said bonds shall be filed in the office of the clerk of the county of New York.

§ 2. It shall be the duty of, and the captain of the port shall have power to divide the port of New York into eleven districts, specifying

the limits and boundaries thereof, and he may, whenever the exigencies of the business demand, redistrict the said port, or alter any such districts. To each of said districts he shall have power to assign a harbor-master to perform the duties thereof, (and may change such harbor-masters from one district to another,) or put two or more districts under the care of one harbor-master, as the exigencies of the business may require.

§ 3. The said captain of the port shall set apart, keep, and reserve all that part of the water adjacent to the wharves of the city of New York, from the east side of pier number two to and including the east side of pier number nine, East River, from the twentieth day of March to the first day of January in each year, for the exclusive use and accommodation of canal-boats and barges engaged in the business of transporting property on the Hudson River or coming to tide-water from the canals of the State, or arriving in said port from Albany or any place north or west thereof, and he shall assign such other accommoda-
11 tions for said canal-boats and barges in other parts of the port of New York as may from time to time be necessary in receiving or discharging their cargoes.

§ 4. No vessel other than canal-boats, barges, or lighters receiving or delivering property from or to said canal-boats or barges, shall use or enter into for the purpose of using any part of the port of New York set apart for the use of canal-boats and barges, without the written consent of the captain of the port first had and obtained therefor, and then only between the first day of January and twentieth day of March in each year, and when not occupied by canal-boats, under a penalty of one hundred dollars for every day that such vessel shall remain in said part of said port so set apart, after being notified to leave by the captain of a port or a harbor-master, and said penalty shall be a lien upon any such vessel, and be enforced by proceedings against, instituted by and in the name of the captain of said port, according to the provisions of the laws of this State concerning attachments of vessels.

§ 5. It shall be the duty of the captain of the said port to collect and receive all fees hereafter provided for the services of harbor-masters, and on the first Monday of each month to make out an account, and duly verify the same on oath, of all moneys which have become due for fees, and have been collected and uncollected, and such account shall be open to the inspection of said harbor-masters at all times, and the money received shall be divided equally between each of the said
12 harbor-masters and himself, share and share alike, after deducting such office and legal expenses as may have been necessarily expended in the discharge of his duties as captain of the port: Provided, however, That such office and legal expenses shall not exceed in any one month the sum of one hundred and fifty dollars.

§ 6. The following fees shall be collected under this act, and no others: All ships or vessels of the United States of one hundred tons burthen or more, except lighters, tugs, barges, and canal-boats, sound and river steamboats employed on regular lines, and all ships or vessels that are permitted by the laws of the United States to enter on the same terms as vessels of the United States, which shall enter the said port of New York, or load or unload, or make fast to any wharf therein, shall pay one and one-half of one per cent. per ton, to be computed from the tonnage expressed in the registers of enrollments of such ships or vessels respectively; all other foreign ships or vessels which shall arrive at and enter the same port, and load or unload, or make fast to any wharf therein, shall pay three cents per ton, to be computed on the ton-

nage expressed in the registers or documents on board. Where difficulties arise between vessels of less than one hundred tons burthen, and the captain of the port or a harbor-master shall be called upon to settle the same, the vessel, canal-boat, barge, or lighter in fault shall pay two dollars. Such fees shall be paid by the masters, owners, or consignees of such ships or vessels, at the office of the captain of the port, or to persons authorized by him to collect the same, within forty-eight hours after the arrival of such ship or vessel. In default of such payment, the same having been duly demanded, such masters, owners, or consignees, on whom such demand shall have been previously made, shall pay double the amount of such fees, to be sued for and recovered, in the name of the captain of said port, in any court having cognizance thereof. All fees under this act shall be paid to the captain of the port, or upon his written order, and he shall have power to employ the necessary assistance in making collections of the same, at an expense of not exceeding five per cent. upon the amount collected, which expense shall not be considered as the ordinary expense of the office. The captain of the port shall have power to designate some harbor-master as his deputy, who may, during his absence, or in case of a vacancy in his office, perform all the duties belonging to the office of captain of the port, and the acts of said harbor-master, so performed, shall be valid and binding.

§ 7. Each harbor-master shall have power, within the district assigned to him, to provide and assign suitable accommodations for all ships and vessels, and regulate them in the stations they are to occupy at the wharves or in the stream, and to remove from time to time such vessels as are not employed in receiving or discharging their cargoes, to make room for such others as require to be more immediately accommodated for the purpose of receiving or discharging their cargoes; and shall have power to determine as to the fact of their being fairly and in good faith employed in receiving or discharging their cargoes; and shall have authority to determine how far, and in what instance, it is the duty of the master and others having charge of ships and vessels to accommodate each other in their respective situations. And if any master, or any person having charge of any vessel, canal-boat, barge, or lighter, shall refuse or neglect to move his vessel, canal-boat, barge, or lighter when ordered to do so by the captain of the port or by a harbor-master, or shall resist or forcibly oppose said officers in the discharge of their duties, such master or person so refusing, neglecting, resisting, or opposing shall for every such offense forfeit and pay the sum of fifty dollars, to be recovered, with costs of suit, by and in the name of the captain of the port, before any court having cognizance thereof.

§ 8. Each of said harbor-masters shall remain in and perform the duties of the district or districts assigned to him by the captain of the port, and shall not absent himself from the cities of New York or Brooklyn without the written permission of the captain of the port. He shall not appoint any deputy or assistant or delegate the powers of his office to any person or persons whatsoever. He shall not collect any fees under this act, unless authorized to do so by the captain of the port; he shall not take or receive, directly or indirectly, any money or valuable thing or compensation for his services, or on account of the exercise of his powers of office, except as provided by this act. Any harbor-master violating any of the provisions of this section shall, upon conviction thereof in any court of record, be punished by a fine of five hundred dollars, and in addition thereto may, in the

discretion of the court, be imprisoned in the county jail for a term not exceeding thirty days.

§ 9. Any person who shall falsely represent himself to be a harbor-master, or wrongfully perform the duties of a harbor-master, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the county jail for a term not exceeding sixty days, and fined, in the discretion of the court, a sum not exceeding twenty-five dollars.

§ 10. It shall be the duty of the captain of the port to hear any complaint against any harbor-master for improperly attending to or discharging the duties of his office, and his defense thereto. He shall examine into such complaint and defense, and have authority to administer oaths upon such examinations, and if, after such examination, there shall, in his judgment, be sufficient ground therefor, he shall send complaint, with the evidence in the matter, to the governor of the State, within ten days from the receipt of such complaint by the captain of the port; and, until the decision of the matter by the governor, he may suspend such harbor-master from the exercise of the duties of his
16 office, and during the period of such suspension such harbor-master shall not receive or be entitled to any pay, if he be adjudged guilty of the offense charged.

§ 11. If the captain of the port shall charge or receive, or bargain to take or receive, directly or indirectly, any fees greater than those allowed by this act, or shall receive, or agree to receive, any money or valuable thing, or compensation whatever, as a present or gratuity for the exercise of his official judgment or discretion, or shall refuse to divide with the harbor-masters the moneys received by him as aforesaid, for each and every refusal he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined five hundred dollars, and imprisoned for a term of one month in the county jail.

§ 12. All fines and penalties collected under this act shall be for, and applied to the use of, the New York Hospital.

§ 13. The captain of the port shall report to the governor of the State, under oath, the whole amount of fees received under this act, each year, to the thirty-first day of December, and such report must be made within ten days from such thirty-first day of December.

§ 14. The terms of office of the present captain of the port and harbor-masters shall continue during the terms for which they were appointed, unless they shall be removed for cause, according to the provisions of this act, and the present captain of the port and harbor-masters shall be governed by and be subject to this act.

17 § 15. It shall be the duty of the captain of the port or a harbor-master, whenever requested by the captain, owner or consignee of any vessel, or any person having charge of any vessel, to show a copy of this act to such captain, owner, or consignee, and no person shall be fined for a violation of this act until that has been done.

§ 16. The governor shall have power to remove the said captain of the port or any of said harbor-masters from office for any malfeasance of office or wilful neglect of the duties thereof.

§ 17. All acts heretofore existing relating to the captain of the port or to harbor-masters of the port of New York are hereby repealed; but nothing contained in this act shall be construed to change, alter, or repeal, or any way whatever interfere with, an act passed April fifteenth, eighteen hundred and fifty-eight, entitled "An act to regulate the use of wharves and slips in the city of New York which shall be leased to certain steamboat lines;" nor shall steamboats employed in river or

sound navigation, or steamboats occupying their own wharf or wharves and slips, leased under said act, be liable to the payment of fees under section six or any other section of this act.

§ 18. This act shall take effect immediately.

STATE OF NEW YORK,
Office of the Secretary of State:

I have compared the preceding with the original law on file in
18 this office, and hereby certify the same to be a correct transcript therefrom and the whole of said original law.

Witness my hand and seal of office of the secretary of state, in the city of Albany, this second day of May, one thousand eight hundred and sixty-five.

[L. S.] CHAUNCEY M. DEPEW,
Secretary of State.

19 (Indorsed:) U. S. circuit court, second circuit, southern district of New York. The Inman Steamship Company (Limited) against Edward G. Tinker, acting as captain of the port. Copy. Amended bill of complaint. Francis Lynde Stetson, solicitor for plff. E. D., No. 8, p. 137. Filed Nov. 18, 1876.

20 U. S. circuit court, southern district of New York.

THE INMAN STEAMSHIP COMPANY (LIMITED)
vs.
EDWARD G. TINKER, ACTING CAPTAIN OF THE port of New York.

The demurrer of Edward G. Tinker, as acting captain of the port of New York, to the bill of complaint of the Inman Steamship Company, (Limited,) complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur thereto, and for causes of demurrer showeth that in case the allegations in the said bill contained were true, as therein set forth, which he does not admit, the said bill contains not any matter of equity whereon to sustain such writ of injunction as is sought and prayed for in and by the said bill; nor hath
21 the said complainant, by its said bill, made such a case as entitles it, in a court of equity, to any relief from or against this defendant touching the matters in said bill contained, or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant doth demur to said bill, and to all the matters and things therein contained, and humbly prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

SCUDDER & CARTER,
Solicitors for Defendant.

I certify that in my opinion the foregoing demurrer of Edward G. Tinker, acting captain of the port of New York, to the bill of complaint

of the Inman Steamship Company,(Limited,) complainant, is well founded in law, and proper to be filed in the above-entitled cause.

HENRY J. SCUDDER,
Of Counsel for Deft.

22 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Edward G. Tinker, being duly sworn, says that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceeding therein.

E. G. TINKER.

Subscribed and sworn to before me this fifteenth day of November, 1876.

[SEAL.] SAML. B. CALDWELL,
Notary Public, Queens Co., N. Y.

23 (Indorsed:) U. S. circuit court, southern district N. Y. The Inman Steamship Company (Limited) vs. Edward G. Tinker, acting captain, &c. Copy. Demurrer. Scudder & Carter, deft.'s solicitors, 66 Wall st. E. D., No. 8, p. 137. Filed Nov. 18, 1876.

24 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the U. S. court building in the city of New York, on the 18th day of November, (1876,) in the year of the Lord one thousand eight hundred and seventy-six.

Present, the honorable Alexander S. Johnson, circuit judge.

THE INMAN STEAMSHIP COMPANY (LIMITED)
against
EDWARD G. TINKER, ACTING CAPTAIN OF THE port of New York.

Upon reading and filing the annexed consent of the parties hereto, and on motion of Francis Lynde Stetson, solicitor for the plaintiff, it is ordered that the bill of complaint and amended bill of complaint heretofore filed and served herein shall be further amended, so as to conform in all respects to the amended bill of complaint verified November 18th, 1876, and herewith filed, and that such last amended bill shall, without prejudice to the defendant's proceedings already had herein, be taken and substituted as and for the original bill of complaint in this action.

25 And it is further ordered that the defendant's demurrer served and filed herein on the 15th day of November, 1876, shall, in all respects, continue, be taken, and stand as a demurrer to the said amended bill of complaint herewith filed, with the same force and effect as though a new demurrer were filed.

ALEX. S. JOHNSON,
Cir. J.

26 U. S. circuit court.

THE INMAN STEAMSHIP COMPANY (LIMITED)
against
EDWARD G. TINKER, ACTING CAPTAIN OF THE port of New York.

It is hereby stipulated and agreed, by and between the parties hereto that the bill and amended bill heretofore filed and served herein shall be further amended so as to conform in all respects to the amended bill herewith filed, and that such last amended bill shall be taken and substituted as and for the original bill in this action.

And it is further stipulated and agreed that the defendant's demurrer served and filed herein on the 15th day of November, 1876, shall in all respects continue, be taken, and stand as a demurrer to the said amended, bill of complaint herewith filed, with the same force and effect as though a new demurrer were filed.

November 18th, 1876.

FRANCIS LYNDE STETSON,
Solicitor for Plaintiff.
SCUDDER & CARTER,
Solicitors for Defendant.

27 (Indorsed:) U. S. circuit court, southern district of N. Y. The Inman Steamship Company (Limited) against Edward G. Tinker, acting captain of the port of New York. Copy. Stipulation & order. Wm. C. Whitney, of counsel for plff., No. 2 Tryon Row, N. Y. Francis Lynde Stetson, solicitor for plff. E. D., No. 8, p. 137. Filed Nov. 18 1876.

28 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court building in the city of New York on the 20th day of November, in the year of our Lord one thousand eight hundred and seventy-six.

Present, the Hon. Samuel Blatchford, U. S. district judge.

THE INMAN STEAMSHIP COMPANY (LIMITED)
against
EDWARD G. TINKER, ACTING CAPTAIN OF THE port of New York.

This cause having come on to be heard upon the amended bill of complaint herein, and the demurrer thereto of the defendant, and having been argued by Francis Lynde Stetson, of counsel for the complainants, and Henry J. Scudder, esq., of counsel for the defendants, and due deliberation being thereon had, it is ordered, adjudged, and decreed,

29 and the court doth hereby order, adjudge, and decree, as follows, viz: That the demurrer of the said defendant be, and the same is hereby, allowed and sustained, and that the complainant's said bill of complaint be, and the same hereby is, dismissed, with costs to the defendant to be taxed, and that the said defendant have execution therefor.

SAML. BLATCHFORD.

30 (Indorsed:) U. S. circuit court, second circuit, southern district of New York. The Inman Steamship Company (Limited) against Edward G. Tinker, acting as captain of the port. Copy. Decree. Scudder & Carter, solicitors for defts. E. D., No. 8, p. 137. Filed Nov. 21st, 1876.

31 United States circuit court, southern district of New York, in the second circuit.

THE INMAN STEAMSHIP COMPANY (LIMITED)
against
EDWARD G. TINKER, ACTING CAPTAIN OF THE port of New York.

To the honorable the Supreme Court of the United States:

The appeal of the Inman Steamship Company, (Limited,) the above-named plaintiff and appellant, respectfully showeth that on the 23d day of October, A. D. 1876, they filed their bill of complaint in the circuit court of the United States for the southern district of New York, in the second circuit, against Edward G. Tinker, acting captain of the port of New York, wherein and whereby it was claimed by the said plaintiff that certain laws of the State of New York should be adjudged invalid, as being in violation of the Constitution of the United States, and praying that the defendant might be enjoined from demanding from the
32 plaintiff the harbor-masters' fees in said bill mentioned and referred to, and that the plaintiff might have such other or further relief in the premises as might be agreeable to equity and good conscience.

That the said defendant, Edward G. Tinker, acting captain of the port, duly appeared in said cause and demurred to said bill, on the ground that the same had not stated such a case as entitled the plaintiff to the relief sought by it, and prayed for a dismissal of said bill with costs.

That the said case was duly heard and argued before the said court on the pleadings therein, and that such proceedings were thereupon had in such court that a final decree was made and entered by the said court, wherein it was ordered, adjudged, and decreed that the said demurrer be sustained, and that the said bill of complaint be dismissed with costs, and that the defendants have execution therefor.

That said final decree, as this plaintiff is advised and believes, is erroneous and ought to be reversed.

Wherefore this plaintiff and appellant appeals from the whole
33 of said decree to the Supreme Court of the United States, and respectfully prays that the said final decree and the appeal and pleadings and proceeding in said case may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the said circuit court, and every part thereof, may be reversed, or such other decree made as to the said Supreme Court shall seem just.

Dated the 20th day of November, 1876.

THE INMAN STEAMSHIP COMPANY, (LIMITED,)
By JOHN G. DALE,
Agent & Attorney in Fact.

The foregoing appeal is allowed.
November 20, 1876.

SAML. BLATCHFORD.

34 (Indorsed :) U. S. circuit court, southern district of New York. The Inman Steamship Company (Limited) against Edward G. Tinker, acting as captain of the port. Copy. Petition for appeal. Wm. C. Whitney, counsel for the plaintiff, No. 2 Tryon Row, N. Y. Francis Lynde Stetson, solicitor for plff. & appellt.

Due & timely service of a copy of the within petition is hereby admitted. Dated Nov. 20, 1876.

SCUDDER & CARTER,
Sols. for Deft.

Filed Nov. 21st, 1876.

35 Circuit court of the United States of America for the southern district of New York, in the second circuit.

THE INMAN STEAMSHIP COMPANY, (LIMITED,) *vs.* EDWARD S. TINKER, ACTING CAPTAIN OF THE port of New York. } Bond for costs.

Know all men by these presents that we, The Inman Steamship Company, (Limited,) a corporation organized and existing under the act of the Parli'ment of the United Kingdom of Great Britain and Ireland, William H. Guion, of No. 5 East 45th street, in the city of New York, and Henry F. Dimock, of No. 66 West 37th street, in the city of New York, are held and firmly bound unto the above-named Edward G. Tinker, acting captain, &c., in the sum of one thousand dollars, to be paid to the said Edward G. Tinker, acting captain, &c., for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the twentieth day of November, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas the above-named The Inman Steamship Company, (Limited,) has prosecuted its appeal to the Supreme Court of the United States to reverse the final decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York, in the second circuit:

Now, therefore, the condition of this obligation is such, that if the above-named The Inman Steamship Company, (Limited,) shall prosecute its said appeal to effect, and answer all damages and costs if it shall fail to make its said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE INMAN STEAMSHIP COMPANY, (LIMITED,)
By JOHN G. DALE, *Agent.* [L. S.]
WILLIAM H. GUION. [L. S.]
H. F. DIMOCK. [L. S.]

Sealed and delivered and taken and acknowledged this 20 day of November, 1876, before me.

GEO. C. LLOYD,
Notary Public, New York.

36 UNITED STATES OF AMERICA,
Southern District of New York, ss:

William H. Guion and Henry F. Dimock, being duly sworn, do depose

and say, and each for himself deposes and says, that he is worth the sum of two thousand dollars over and above his just debts and liabilities.

WILLIAM H. GUION.
H. F. DIMOCK.

Sworn to this 20th day of November, A. D. 1876, before me.
[L. S.]
GEO. C. LLOYD,
Notary Public, New York.

(Indorsed:) Vol. , page . U. S. circuit court. The Inman Steamship Company, (Limited,) vs. Edward G. Tinker, acting captain of the port of New York. Bond for costs on appeal. Francis Lynde Stetson, proctor.

I approve the form and sufficiency of the within bond.
Nov. 20, 1876.

SAML. BLATCHFORD.

Filed this 21 day of Novr., 1876.

37 By the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to Edward G. Tinker, acting captain of the port of New York:

Whereas the Inman Steamship Company, (Limited,) has appealed to the Supreme Court of the United States from a final decree rendered in the circuit court of the United States for the southern district of New York, in the second circuit, entered with the clerk of said court on the 20th day of November, 1876, said decree being in favor of you, the defendants, in a suit in equity brought by the said The Inman Steamship Company, (Limited,) as plaintiff, against you, the said Edward G. Tinker, acting captain of the port of New York, and has given the security required by law:

You are hereby cited to appear before the Supreme Court of the United States, at the city of Washington, on the second Monday of October, 1877, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, on the 20th day of November, 1876, and of the Independence of the United States the one hundred and first.

SAML. BLATCHFORD.

38 (Indorsed:) U. S. Supreme Court. The Inman Steamship Company, (Limited,) against Edward G. Tinker, acting captain of the port of New York. Citation.

Due and timely service of a copy of the within citation is hereby admitted.
Dated New York, Novr. 20th, 1876.

SCUDDER & CARTER,
Solicitors for Deft.

Filed Nov. 21st, 1876.

39 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do

hereby certify that the foregoing pages, numbered from one to thirty-eight, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Inman Steamship Company, (Limited,) against Edward G. Tinker, acting captain of the port of New York, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 22d day of November, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the said United States the one hundred and first.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

(Indorsement on cover:) No. 937. The Inman Steamship Company, appellant, vs. Edward G. Tinker, acting captain of the port of New York S. New York. C. C. U. S. Filed 23rd November, 1876.

In the Supreme Court of the United States.

THE INMAN STEAMSHIP COMPANY,
(Limited,)
APPELLANT,

against

EDWARD G. TINKER,
Acting Captain of the Port of New York,
APPELLEE.

October Term,
1876,
No. 937.

BRIEF FOR THE APPELLANT.

WILLIAM M. EVARTS,
FRANCIS LYNDE STETSON,
Of Counsel for the Appellant.

M. B. Brown's Print, 201 *William St. N. Y.*

In the Supreme Court of the United States.

THE INMAN STEAMSHIP COMPANY (Limited), a Corporation created and established under the acts of the Parliament of Great Britain and Ireland,
Plaintiff and Appellant,

against

EDWARD G. TINKER, as Acting Captain of the Port of New York, a citizen of New York,
Defendant and Appellee.

Brief of the Appellants.

STATEMENT OF THE CASE.

This suit was brought in the Circuit Court of the United States for the Southern District of New York, sitting in equity (Record, side page 3).

The plaintiff, a corporation created under the acts of the Parliament of Great Britain and Ireland, and operating a regular line of steamships between Liverpool and New York (Record, side page 3), by its bill prayed for an injunction (Record, side page 3), to prevent the defendant

In the Supreme Court of the United States.

THE INMAN STEAMSHIP COMPANY (Limited), a Corporation created and established under the acts of the Parliament of Great Britain and Ireland,
Plaintiff and Appellant,

against

EDWARD G. TINKER, as Acting Captain of the Port of New York, a citizen of New York,
Defendant and Appellee.

Brief of the Appellants.

STATEMENT OF THE CASE.

This suit was brought in the Circuit Court of the United States for the Southern District of New York, sitting in equity (Record, side page 3).

The plaintiff, a corporation created under the acts of the Parliament of Great Britain and Ireland, and operating a regular line of steamships between Liverpool and New York (Record, side page 3), by its bill prayed for an injunction (Record, side page 3), to prevent the defendant

from collecting of it fees of one and one-half cents per ton upon the registered tonnage of each of its vessels every time one of them should enter the port of New York; three of such vessels entering said port in every five weeks (Record, side page 4).

The defendant who was and is Acting Captain of the Port of New York, and a resident of the Southern District of New York (Record, side page 3), claimed the right, *irrespective of the question of service* (Record, side page 4), to collect such fees for the benefit of himself and of the harbor-masters of the Port of New York, under the provisions of chapter 487 of the Laws of the State of New York, passed in 1865, of which a copy is annexed to the bill (see transcript of Record, side page 9).

The plaintiff's bill alleged that this act was invalid as being in opposition to the Constitution of the United States in these two particulars (Record, side page 5): *first*, as to the terms of the 8th section of the 1st article thereof, which prescribes that "the Congress shall have power * * * * * * * * * * 3. To regulate commerce with foreign nations," and *second*, as to the terms of the 10th section of the same article which prescribes that "no State shall, without the consent of Congress, lay any duty of tonnage."

The bill further alleged, that in case of refusal to pay these fees, the plaintiff was liable to a penalty and its vessels to process of attachment for each refusal (Record, side page 6), and that by reason of the provisions of this act, and of the requirements of the defendant, it was and is liable to a multiplicity of suits (Record, side page 7),

and to great and irreparable injury if the act in question is void, as the plaintiff contends, and is enforced by the defendant and his successors.

The bill prayed for an injunction against the defendant proceeding to enforce this act, and for general relief (Record, side page 8).

To the bill of the plaintiff, setting forth these facts, the defendant interposed a general demurrer for want of equity (Record, side page 20).

The court below sustained this demurrer (Record, side-page 29), and from the decree to that effect, and dismissing the complainant's bill, with costs, this appeal is now brought (Record, side-page 31).

The statute in question, so far as it requires a payment of fees for every vessel entering the port of New York, is alleged by the plaintiffs here, and in its bill in the court below, to be simply an effort of a State to impose *a regulation upon commerce with a foreign nation*, and, in so far as those fees are to be ascertained and levied according to the tonnage of each vessel, the act is claimed to be an attempt by one of the States, *without the consent of Congress, to lay a duty of tonnage.* In each of these particulars, the act is alleged by the plaintiff, both here and in the court below (Record, side-page 6), to be in violation of the Constitution of the United States, and to deprive the plaintiff of the right to Federal legislation, and the immunity from State legislation, upon these subjects secured to it by the Constitution, thus justifying an appeal to this court without regard to the amount involved (U. S. Rev. Stats., § 699, subd. fourth).

SPECIFICATIONS OF ERROR.

I.—The decree of the Court below is erroneous in this, viz.:

It fails to declare that the act of the Legislature of the State of New York, under which alone the defendant claims right to collect fees, is invalid in so far as it seeks to authorize the collection of fees from vessels engaged in foreign commerce, while the eighth section of the first article of the Constitution of the United States provides that the Congress shall have power to regulate commerce with foreign nations, and among the several states.

II.—The decree of the Court below is erroneous also in this, viz.:

It fails to declare that the act of the Legislature of the State of New York, under which alone the defendant claims right to collect fees of one and one-half cents per ton of plaintiff's steamships is invalid in so far as it seeks to lay a duty of tonnage, without any consent of Congress, which it, by the tenth section of the first article of the Constitution of the United States, is forbidden that any State shall do.

III.—The decree of the Court below is erroneous also in this:

It fails to grant the prayer of the plaintiff and it does grant the prayer of the defendant, simply because of the before-mentioned act of the Legislature of the State of New York, and notwithstanding the fact that such act is in violation of the Constitution of the United States in the particulars before mentioned.

BRIEF OF THE ARGUMENT.

FIRST SPECIFICATION OF ERROR.

The act of the Legislature of the State of New York, under which alone the defendant claims right to collect fees, is invalid, in so far as it seeks to authorize the collection of fees from vessels engaged in foreign commerce, while the eighth section of the first article of the Constitution of the United States provides that "the Congress "shall have power to regulate commerce with foreign nations, and among the several states."

In support of its first specification of error, the appellant proposes to present the following considerations as to the law in question, viz.:

Objections upon which appellant rests its first specification of error.

I.—The New York Statute is a regulation of commerce.

II.—While the New York Statute, though a regulation of commerce, may not be obnoxious to criticism in so far as it provides a system for regulating the movements of vessels in port, it is entirely improper and unconstitutional in so far as it assesses upon commerce the cost of maintaining that system.

Objections upon which appellant rests its first specification of error.

III.—The payments are exacted under the New York law, not on account of particular services, tendered or rendered, but generally whether services are rendered or not.

IV.—The payments are exacted under the New York law, not for the benefit of individuals, but indirectly for the treasury of the State.

These considerations the appellant will, so far as permitted in the discussion of the current cases, present separately, with the reasons sustaining them.

I.—*The New York Statute is a regulation of commerce.*

The New York statute a regulation of commerce.

This statement it seems hardly possible to refute, nor is it seriously disputed. The counsel for the appellee in his first point admits this by claiming that the statute "is in "aid and furtherance of commerce and not to its hin- "drance." His further statement, that it is not a regulation of commerce *within the intendment of the Constitution*, is the very question to be discussed in the following points.

The whole object of the act is to control the movement of shipping in the harbor of New York, and it is not now necessary to demonstrate that the term "commerce" also includes "navigation" (9 Wheat. 190).

The consideration given to the subject in the brief for the appellee (pages 4, 5, 6, and 7) suggests the propriety of an expression, at this place, of the appellant's understanding as to the origin of the office of harbor-master.

History of legislation concerning wharves of New York city.

The learned counsel says that "the origin of the 'harbor-master' is ancient," but this conclusion rests on the correctness of his proposition that the early laws (which he cites) really had reference to such an officer. A brief examination may determine whether this was the fact.

The "Laws of New Netherlands" undoubtedly did confer upon the "Fiscal" the duty of regulating shipping in the harbor, *but it gave to him no authority to impose fees therefor upon such shipping*, such as those of which the appellant now complains. Again, after a consideration of the functions of the "Fiscal," it would not be easy to believe that, to the Knickerbockers of his day, he presented the idea of a harbor-master even in embryo. He had large authority with reference to imports, exports, and shipping, combining, in fact the powers of Secretary of the Treasury, Collector of the Port, Surveyor of the Port, Naval Officer, and Wharfinger for the Municipality (which owned, substantially, all the water-front). Because his authority was so large, that it excluded the possibility of the existence of any other commercial officer, to him only could be traced back the lineage of the Harbor Master, after the learned counsel for the appellee had concluded that the pedigree must be established. But the fact that the office of "Fiscal" contained the potential germ of several species of diverse offices thereafter to appear, fails to establish that in the time of the "Fiscal"

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each office existed. Even the evolution theory does not assert the identity of the developed man with the ancestral ape, and urges only that he is one of the results of the early prototype. Who then will seriously maintain that the office of the resultant Harbor-master is identical with that of the possibly ancestral "Fiscal?" Until this is established the existence of the former office is not justification for the present one.

Bradford's laws of 1691 (p. 12), refer only to the construction, erection, and maintenance of the various edifices and highways of the city including its *wharves*. The officer who enforced these regulations so far from being the ancestor of the harbor-master was his converse, and sought to regulate not the ship, but the wharf; not the master or owner of the vessel but the wharf-owner.

In 1731, the wharves were for the most part owned by the city, and the ordinance adopted in that year provided for the collection of wharfage for their use. The collector (called the Dock or Haven Master) was incidentally authorized to regulate the position of vessels using the wharves. The money which he collected was not, however, fees for such regulating, but was the wharfage due to the city, one-half of which he paid into the city treasury, retaining the other half as his compensation for his services to the municipality. In his duties and powers, he resembled the wharfinger afterwards created rather than the harbor-master.

The wharfinger, called into existence and recognized by the laws of 1770, 1771 and 1784, was the representative of the owner of the wharf, and in his position illustrated

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the unquestioned doctrine of his day, that the authority to regulate the use of the wharf was incidental to its ownership, and was to be exercised with reference to the owner's interests. Accordingly the owners were by these laws authorized to appoint wharfingers to collect wharfage, and in case the master or owner of any ship should neglect or refuse to move his vessel backward or forward, at the same wharf, a penalty was payable *either* to the wharfinger or *to the owner*.

In 1796, appears for the first time an officer who, having neither any other function of government, nor any interest in or control over the wharves themselves, assumes to regulate their use, and not for their use, but for his own support, to collect fees from commerce. For, notwithstanding such fees, each ship still had to pay the regular wharfage, as appears from the contemporaneous and subsequent statutes on that subject (*infra.*)

It would seem, therefore, that the harbor-master and his fees were alike unknown to the framers of the Constitution of 1789, and it is difficult to believe, that to them the right to appoint such an officer and to support him from commerce, appeared to be so essential to the sovereignty of the several States that they could not conceive of its surrender to the federal government.

Neither does the form of the first harbor-master's act indicate that the New York legislators were convinced of its propriety. In the first place it seems to have been merely a temporary and tentative expedient, for though not adopted until April 1, 1796, it was provided that it should continue in effect only "to the first of May, next."

The New York statute a regulation of commerce.

History of legislation concerning wharves of New York city.

And in the second place its restriction to foreign shipping suggests that these legislators (acting, as the learned counsel for the appellee remarks, "within a few years "after the adoption of the Constitution in the State "where many of its ablest framers and expounders "swayed great political power"), hardly inclined to submit the act to the test of home criticism. Its closing section (re-enacted in the statute of April 3, 1801, 2 K. & R., 133), provides that the harbor-master shall demand nothing from coasting vessels of the United States unless upon application of the person in charge, he shall interfere and adjust any difference which may happen respecting the position of any such coasting vessel, and in case of compliance with such request he may demand and recover the sum of one dollar for every difference adjusted and no more (3 Greenleaf, 317).

Here was a clear recognition of the principle, that particular service rendered upon request, was the proper basis for such charges; it was only as against the foreigner, that the theory of payment for general usefulness was enforced.

The learned counsel for the appellee intimates that there has been no essential change in the harbor master's acts from 1796 till now. While that is substantially true, it is proper to note that the clause last cited has dropped out of the later statutes.

Neither can any theory that the act legislates not for "entering or anchoring in the harbor, but for using the

"territory of the State '*by loading or unloading or* "'*making fast to the wharves*'" (1 Robt., N. Y. Superior, 203), deprive the act of its commercial character.

The New York statute a regulation of commerce.

First. The act (§ 7) assumes jurisdiction over vessels "in the stream," as well as those "at the wharves," and (§ 6) imposes a charge upon "vessels which shall enter the port of New York," as well as on those which "load or unload or make fast to any pier therein."

Secondly. It does not profess to give or authorize the use of wharves, but merely prescribes the order in which such use may be made.

From the earliest time to the present, it has been recognized that the right to collect for the use of the soil, rests in the owner of the wharf, and from time immemorial the legislature has been accustomed to prescribe the rate of charge for such use, with which the harbor master has absolutely nothing to do.

Revised Laws, 1813, vol. 2, § 212, p. 429.
Laws 1852, chap. 266.
Laws 1860, chap. 254.
Laws 1865, chap. 569.
Laws 1872, chap. 320.

As to docks owned by city and leased to regular lines.

Laws 1870, chap. 137, § 99.
Laws 1871, chap. 574, § 6, subd. 6.

So soon as the vessel makes fast to the wharf, one tonnage is demanded by the harbor-master and another by the wharf-owner.

Thirdly. The ship does not cease to be an instrument of commerce merely because it has reached its port of destination. So long as the vessel is

The New York statute a regulation of commerce.

loading, unloading, or spending the intermediate time at a pier, it is actually engaged in its commercial venture. The seventh section of the act shows that so far as it affects vessels lying at wharf, it refers only to "such "vessels as are employed in receiving or discharging "their cargoes." That is, such as are actually employed on their voyage. This view derives support from the opinion of Mr. Justice MILLER (*Henderson* vs. *The Mayor*, 2 Otto, 271), where he says: "The transportation of a pas- "senger from Liverpool to the city of New York is one "voyage. It is not completed until the passenger is dis- "embarked at the pier in the latter city. A law or a "rule emanating from any lawful authority which pre- "scribes terms or conditions on which alone the vessel "can discharge its passengers is a regulation of commerce." So, any law or rule emanating from any lawful authority which prescribes terms or conditions on which alone the vessel can put itself in position to discharge or receive either passengers or cargo, is not merely an exercise by the legislative authority of its right of control over its own territory, but it operates as a regulation of commerce.

Henderson *vs.* Mayor of N. Y., 2 Ott. 271.

II.— *While the New York Statute, though a regulation of commerce, may not be obnoxious to criticism, in so far as it provides a system for regulating the movements of vessels in port, it is entirely improper and unconstitutional, in so far as it assesses upon commerce the cost of maintaining that system.*

At the very outset it becomes necessary to disclaim any intention of assailing this New York statute as a whole;

the appellant criticises only the sixth section thereof, which compels the payment of fees, and not the other sections establishing general regulations for the port of New York.

The sixth section of the New York Statutes an unconstitutional regulation of commerce.

This concession avoids much of the able argument of the counsel for the appellee, which asserts in the State the right to regulate the movement of shipping in its harbors. The only question raised by the appellant (under this branch of the argument) is this, can the cost of supporting that system of regulation be assessed upon commerce?

The necessity of this disclaimer arises in view of the interpretation given by this Court to the clause of the federal constitution now under consideration.

Were the question still an open one, it might be urged with force, that this clause was intended to secure to foreign and inter-state commerce the advantage of a single harmonious code of harbor regulations, applicable to all the ports of the Union and emanating from the federal legislature. In this way only was it possible that the stranger entering the ports of the different States could escape the conflicting and vexations devices by which the local authorities of each harbor have from the colonial days sought to add to their power and profit.

But though the theory of jurisdiction in the separate States has been urged far beyond the limit which we would have drawn, we may, without questioning any decision of this court, insist upon the unconstitutionality of this sixth section, unless this court is prepared for the first time to hold that, instead of the federal power being as exclusive as the commerce clause of the constitution sug-

gests, there is, in fact, *no local or port regulation which the States may not enact.*

Effect of decisions discriminating between powers to regulate commerce.

The decisions of the Courts as to the constitutionality of laws operating as regulations of commerce, have, with reference to the subjects of those laws, divided them into three classes, viz.: first, those subjects which, from their nature, require exclusive legislation by Congress; second, those subjects as to which the power to legislate must, from their nature, be held to have been reserved to the States as necessary to the administration of their internal affairs; and, third, those subjects which, in their nature, permit legislation by the States so long as no contrary legislation on the same subject shall be enacted by Congress.

As the validity of the law we are criticising may, to some extent, depend upon the class of powers to which it should be referred for its derivation, it seems proper to consider, for a moment, the judicial expositions as to the differences and purposes of these three classes.

First-class of powers: exclusive in Congress.

As to the first class, it was said by Mr. Justice MILLER, in delivering the opinion of the Court in *Henderson* vs. *The Mayor* (2 Otto, 272): "These decisions, however, all "agree that, under the commerce clause of the constitu- "tion or within its compass *there are powers which, from* "*their nature, are exclusive in Congress*, and in the case "of *Cooley* vs. *The Board of Wardens* it was said that,

"'whatever subjects of this power are in their nature
"'national, or admit of one uniform system or plan of
"'regulation, may justly be said to be of such a nature as
"'to require exclusive legislation by Congress.'"

While to counsel it seems that such "an uniform sys-
"tem or plan of regulation" would not be only admissible, but very beneficial with reference to the subject of this New York law, it is not proposed to insist upon this assumption.

Second class of powers: never surrendered by States.

In illustration *of the second class of powers* may be cited the words of Mr. Chief Justice MARSHALL in the very pioneer among the cases limiting State legislation. He says, in *Gibbons* vs. *Ogden* (9 Wheat, 203), in substance: "Inspection laws, quarantine laws, health laws of every de-
"scription * * * * * * * * * * * * *
"are component parts of a mass of legislation over sub-
"jects within the State *not surrendered to a general gov-*
"*ernment*, and, consequently, remaining subject to State
"legislation." Further illustration was given by the late Chief Justice, in the case of the *Steamship Company* vs. *Port Wardens* (6 Wall, 31–33), where, after speaking of inspection laws, he says: "And some other powers the
"exercise of which may in various degrees affect com-
"merce, have always been held to be *not within the grant*
"*to Congress*. To this class it is settled belong quaran-
"tine and other health laws, laws concerning the domestic
"police, and laws regulating the internal trade of a State." So, in the case of *Peete* vs. *Morgan* (19 Wall, 581–583), Mr. Justice DAVIS recognizes these powers, by treating of their source and limitations. He says of the power to enact quarantine laws: "The source of this

The second class of powers: inherent in the States.

"power is in the acknowledged right of the State "to provide for the health of its people, and although "this power, when set in motion, may, in a greater or less "degree, affect commerce, yet the laws passed in the ex- "ercise of this power are not enacted for such an object. "They are enacted for the sole purpose of preserving the "public health, and if they injuriously affect commerce, "Congress, under the power to regulate it, may control "them."

And, finally, in the last case upon the subject (Henderson *vs.* The Mayor, *supra*) Mr. Justice MILLER both recognizes and defines these powers. He says it is assumed "that in "the formation of our government certain powers neces- "sary to the administration of their internal affairs are re- "served to the States, and that among these powers are "those for the preservation of good order, of the health "and comfort of the citizens and their protection against "pauperism and against contagious and infectious diseases, "and other matters of legislation of like character * * "This power frequently referred to in the decisions of this "Court has been in general terms somewhat loosely called "the 'police power.'"

It does not seem necessary to refer this New York legislation concerning the use of a harbor to the exercise of this "police power," so called, although in its "loose use" the term has sometimes been so applied. In its essence this power forms part of that sovereignty of the State which, in view of its responsibility to its own citizens, it cannot be held to have surrendered to the general government. Since it is the duty of the State to protect the lives, the

health, the internal traffic of its citizens, so is there reserved to the States the correlative right to enact health laws, quarantine laws, laws for the punishment of crimes and for the regulation of internal trade, even though such laws shall indirectly affect commerce. This reasoning, however, cannot apply to an act which provides simply for the disposition or arrangement of vessels in a seaport open to the commerce of all the States and of all the world. If the commerce sailing into that seaport is placed under the especial care of Congress, it seems illogical to conclude that the right to arrange for the reception of that commerce so inheres in the State that it cannot be surrendered without a fresh desecration of a sovereign power. We are not, therefore (especially in view of the case of *Cooley* vs. *The Board of Wardens*, hereinafter considered), prepared to concede that this law concerns a subject necessarily included within the inherent powers of the State of New York, which cannot be held capable of surrender, whether they be called the "police power" or not. But even if this law were to be traced to that source, it would not follow that any clause which it contains constituting an unnecessary regulation of commerce, such as the imposition of fees, is on that account to be sustained. To that extent the act is outside the "police power," and falls within the observation of Mr. Justice MILLER as to this power: "No definition of it, and no urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution. Nothing is gained in the argument by calling it the police power. It is clear from the nature of our complex form of government, that whenever the statute of a State invades

The New York law not to be traced to the exercise of powers of the second-class.

" the domain of legislation which belongs exclusively to " the Congress of the United States it is void, *no matter* " *under what class of powers it may fall, or how closely* " *allied to powers conceded to belong to the States.*" Therefore we claim that in the theory supporting the existence of this power, there is nothing to justify the sixth section of this New York law, which is hereinafter particularly considered.

Third-class of powers reserved to States until exercised by Congress.

The *third class of powers* was discriminated by Mr. Justice CURTIS in *Cooley* vs. *The Board of Wardens of Philadelphia* (12 How., 299). He says (p. 319): "It " would be in conformity with the contemporary exposi- " tion of the Constitution and with the judicial construc- " tion given from time to time by this Court after the " most deliberate consideration, to hold that the mere " grant of such a power to Congress did not imply a pro- " hibition on the States to exercise the same power; that " it is not the mere existence of such a power, but its " exercise by Congress, which may be incompatible with " the exercise of the same powers by the States, and *that* " *the States may legislate in the absence of congressional* " *regulations.*"

This doctrine, however, has not been suffered to pass unquestioned. Mr. Justice MILLER (in *Henderson* vs. *The Mayor*, *supra*), after referring to " a kind of neutral " ground, especially in that covered by the regulation of " commerce, which may be occupied by the State and its " legislation, be valid so long as it interferes with no act " of Congress or treaty of the United States," says:

"*This doctrine has always been controverted in this "court, and has seldom, if ever, been stated without dis-"sent.*"

If the New York law does not, in its entirety, conflict with the commercial grant, it would seem to be only because of this theory of a "neutral ground." And, as Judge CURTIS and the majority of the Court referred the pilotage laws to that source, and to that only, it does not seem that these harbor regulations (in many respects closely analogous to the pilotage laws) can be traced back to the inherent authority of the State to pass laws of the second class which we have considered. It is our contention that the only theory upon which this law can be sustained is, that it falls within the third class of powers, and that Congress has not yet legislated upon the subject.

The New York law to be referred to the exercise of powers of the third class.

In view of the observation of Mr. Justice MILLER, to the effect that the existence of this class of powers has always been the subject of controversy in this court, it is hardly believed that this Court inclines to extend this "neutral ground," or that it will, of its own motion, invite the Legislatures of the different States to multiply and diversify their regulations of commerce. How far, then, will the Court be compelled to go in obedience to former decisions?

What is the result of the decisions as to such State laws as are good until legislation by Congress?

The leading case is, of course, *Cooley* against *The Board of Wardens*, and yet if it was ever intended that a decision should not serve as a general precedent, the Court here exhibits that intention. After holding that the law in

(1) Cooley *vs.* The Board of Wardens, 12 How., 299.

Review of decisions as to regulations of commerce. (1) Cooley *vs.* Board of Wardens.

question, though within the commercial grant to Congress was not void because that grant did not deprive the State of the right to regulate pilots, "until Congress should find "it necessary to exert its powers," and because the only act of Congress upon the subject (August 7, 1789) had not excluded the action of the States, the Court proceeds to say (p. 321): "To these precise questions which are all we "are called on to decide this opinion must be understood to "be confined. It does not extend to the question of what "other subjects under the commercial power are within "the exclusive control of Congress, or may be regulated "by the States in the absence of all congressional regula-"tion. * * * * * We decide the precise questions "before us upon what we deem sound principles applica-"ble to this particular subject in the state in which the "legislation of Congress has left it. We go no further."

It is important, therefore, to determine *exactly* what conclusions were reached in that decision. It treated of a Pennsylvania law authorizing the collection of "half-pilotage" in certain cases where a pilot's service was tendered and refused; the sum collected to go to the use of the Society for the Relief of Distressed and Decayed Pilots and their Widows and Orphans. It was asserted that this law operated as a regulation of commerce, and to lay duties on imports and exports, and also on tonnage. While the Court sought to divide its discussion of the law with reference to these three different constitutional provisions, it is clear that its preliminary observations as to the character of the law are applicable in all the succeeding examination.

These preliminary observations (p. 312) were to the effect

Review of decisions as to regulations of commerce. (1) Cooley *vs.* Board of Wardens.

that the law operated as an appropriate regulation of the subject of pilots and pilotage, because—first, such or similar laws had been generally adopted in commercial States and civilized countries; second, it was desirable upon considerations of public policy to discourage commanders of vessels from refusing to receive such persons on board at the proper times and places; third, it was only just that a certainty of recompense should be established for pilots, a class of men who have incurred labor and expense and danger to place themselves in a position to render important service generally necessary to commerce; and, fourth, there were many cases in which an offer to perform, accompanied by present ability to perform, was deemed by law equivalent to performance, and by the law of commercial States and countries an offer of pilotage service was made one of these cases. This last consideration has been emphasized by this Court in the case of the *Steamship Company* vs. *Joliffe* (2 Wall, 450), holding that the claim for half-pilotage rests upon a *quasi* contract between the master or owner of every vessel entering a port and the individual pilot offering his services.

It would seem that none of these reasons, excepting possibly the first (as to the existence of similar laws in other commercial countries), is applicable to the subject of our action. No principle of public policy can be invoked to show that such charges as those for harbor-masters should be imposed on commerce; the harbor-masters, who are simply officers of the State, not rendering personal service, but exercising official powers, bear no resemblance to a trained body of pilots who have, by self-exertion and self-exposure, developed a personal and peculiar fitness for rendering service to commerce; and neither the New York law,

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(1)
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nor the harbor-masters themselves, make the claim to the fees dependent upon service rendered or tendered. As the New York law is thus without the scope of the preliminary observations of this great decision, does it fall within the line of reasoning afterward adopted, that the commercial grant to Congress did not avoid the pilotage law?

The Court there held (pp. 319–320), that in absence of adverse legislation by Congress, these pilot laws, through a regulation of commerce, were valid, and that the pilot laws of Congress, of August 7, 1789, manifested the understanding of Congress at the outset of the government, that the nature of the subject was not such as to require its exclusive legislation. Mr. Justice DANIEL alone held that the right to enact pilotage laws so inhered in the State that it could not have been surrendered, while Messrs. Justices MCLEAN and WAYNE believed the matter to be within the exclusive consideration of Congress.

It is sufficient in this connection to notice that no act of Congress has ever declared its understanding as to any system of port regulations.

In view, then, of the careful limitation of the opinion (p. 321) given by Mr. Justice CURTIS, it can hardly be said that the decision which he announces is applicable in support of the law now under criticism. Those who have attempted to make such application of this case have always cited the language of Mr. Justice DANIEL, which, it must be remembered, was not that of the Court.

In two other cases this court has sustained certain local

harbor regulations so far as they operated to direct and control the movements of vessels in port. Neither of these decisions, however, treated of the right of any State to assess upon commerce the expense of maintaining a system for enforcing such regulations, which is the only respect in which we attack the New York law.

Review of decision as to regulations of commerce.

In the first case (*Steamboat New York* vs. *Rea*, 18 How., 223–226), Mr. Justice NELSON recognized as valid "the regulation of steamboats and other water-craft in "the ports and harbors of the States which is required for "the accommodation and safety of vessels resorting "thither in the pursuits of business and commerce. "These are police regulations in aid and furtherance of "commerce enacted by the local authorities, who have a "knowledge of the wants of the locality, and a deep in- "terest in properly providing for them."

(2) Steamboat New York *vs.* Rea, 18 How., 223.

The learned justice for the court, therefore, held that such a law was binding upon the New York courts, though not upon those of the United States.

(3) Brig James Gray *vs.* ship John Frazer, 21 How., 185.

In the second case (*Owners of the Brig James Gray vs. Owners of the Ship John Frazer*, 21 How., 185), Mr. Chief-Justice TANEY, speaking of similar regulations, says: "The power of the city authorities to pass and enforce "these ordinances is disputed by the defendants. Regu- "lations of this kind are necessary and indispensable in "every commercial port for the convenience and safety "of commerce. * * * * * * They are like to the "local usages of navigation in different ports, and every "vessel, from whatever part of the world she may come,

Review of decisions as to regulations of commerce.
(3) Brig Gray *vs.* Ship Frazer, 21 How, 185.

"is bound to take notice of them and conform to them, "and there is nothing in the regulations referred to in "the port of Charleston *which is in conflict with any law* "*of Congress regulating commerce* or with the general "admiralty jurisdiction conferred on the courts of the "United States." He, therefore, for the Court, notwithstanding the dissent of Justices NELSON and CLIFFORD, held the ordinance binding on the courts of the United States.

It is to be observed that the learned chief justice rests the validity of this ordinance upon the fact that Congress had passed no contrary law, thereby indicating that the right to pass such laws was not, as Mr. Justice DANIEL expressed himself in the pilotage case, "an original and inherent "power in the States, and not one to be merely tolerated "or held subject to the sanction of the Federal govern-"ment." It should be also noticed that in neither of these cases was the question of constitutionality presented otherwise than very indirectly and collaterally.

(4) Benedict *vs.* Vanderbilt (N. Y. Supr. Ct.), 1 Robt., 194.

The next case upon this subject was decided in the Superior Court of the City of New York in 1863 (*Benedict vs. Vanderbilt*, 1 Robt, 194). This decision is directly in point and sustains the constitutionality of a New York statute superseded by the present one, but resembling it in all essential features. It is to be noticed that in both opinions reported, the conclusions of the Court are based upon the case of *Cooley vs. The Port Wardens*, heretofore considered and distinguished. It is also to be noticed that the only opinion offering any reasons for the conclusion attained, that of Judge ROBERTSON, misconceives the

Review of decisions as to regulation of commerce.
(4) Benedict *vs.* Vanderbilt, 1 Robt., 194.

former decision in an important particular. He says it was there held that the "power of Congress to collect "duties *and regulate commerce* did not interfere with any "right of the State to levy duties or *regulate navigation* as "a part of commerce for local purposes, if known and "practised at the time of the adoption of the Federal con-"stitution as distinct from levying duties for general pur-"poses of revenue." Judge CURTIS said nothing of the sort, as *to the regulation of commerce* (which is the clause we are now considering). With reference to the prohibition of duties on tonnage, etc., he said that such duties were, at the time of the framing of the Constitution, known to be distinct from fees and charges for pilotage, for wharfage or tonnage, or any other port charges *for services rendered*, and that to declare that such charges were embraced under the words imposts or duties on imports, exports or tonnage, would be to confound things essentially different. On the other hand, however, he subsequently declared that such charges *did* operate as regulations of commerce, and avoided the effect of this conclusion upon the pilotage law, because of the phraseology of an act of Congress upon the same subject. It is of consequence in determining the applicability in any event of this reasoning of Judge CURTIS, to remember that no harbor master's law is shown to have been enacted until that of New York in 1796, seven years after the framing of the Constitution, which could not therefore have recognized the right of the States to pass such a law. Judge ROBERTSON also held that the fees were exacted for "use of the soil," which we have already seen to be contrary to the conclusion of this Court in *Henderson vs. The Mayor*, that the voyage is not terminated merely because the vessel has touched

land. It is to be observed that this Court has taken the opposite position on the general subject since the rendering of the New York decision, which must be considered as overruled.

Review of decisions as to regulation of commerce. (5) Steamship Co. *vs.* Port Wardens, 6 Wall, 31.

In December, 1867, this Court rendered a decision which seems conclusive upon this subject, Mr. Chief Justice CHASE delivering the opinion of the Court (*Steamship Company vs. Port Wardens*, 6 Wall, 31).

A statute of Louisiana enacted that the Masters and Wardens of the Port of New Orleans should be entitled to demand and receive, in addition to other fees, the sum of five dollars, whether called upon to perform any service or not. This was held to be a regulation of commerce coming within none of the limitations or exceptions of the general rule of the Constitution that the regulation of commerce among States is in Congress.

In February, 1870, Mr. Banfield, Solicitor of the Treasury, in answer to an inquiry of Congress why the Collector of the Port of New York was permitted to collect these fees for the Harbor Masters of New York, submitted his opinion that the cited decision of this Court did not apply. He said that this case decided only that a due demanded by a Port Warden where no services are performed is unlawful, and that the entire force of the decision rests upon the fact that there were no services and no offer to perform any.

This seems to be erroneous. The Chief Justice de

cided that it was a regulation of commerce because it imposed a tax upon every ship entering the port of New Orleans, to be collected on every entry, which in case of a steamer plying between that port and ports of the adjoining States of Alabama and Texas, becomes a serious burden and liable to work the very mischief against which the Constitution intended to protect commerce among the States.

Review of decisions as to regulation of commerce.

(5) Steamship Co. *vs.* Port Wardens, 6 Wall, 31.

It was only in refutation of the claim that the exactions operated as compensation for general service of the Wardens, and therefore were to be supported under the half-pilotage case (*Cooley* v. *Port Wardens*), that the Chief Justice made these two answers, which are equally applicable in this case: (1.) No act of Congress recognizes such laws as that of Louisiana as proper and beneficial regulations while State laws in respect to pilotage are thus recognized. (2.) The right to recover pilotage and half-pilotage, as prescribed by State legislation, rests not only upon State laws but upon contract, pilotage being compensation for services performed, half-pilotage compensation for services which the pilot had put himself in readiness to perform by labor, risk, and cost, and which he had actually offered to perform.

It is to be noticed that the first of these answers is applicable, whether service is performed or not.

The effect of this decision is positive and unmistakable, and was so recognized by the Supreme Court of New Jersey in November, 1870, in the last reported case on this branch of the general subject (*Hackley* v. *Geraghty*, 34

(6) Hackley *vs.* Geraghty, 34 N J. Law, 332.

Review of decisions as to regulations of commerce. (6) Hackley vs. Geraghty, 34 N. J. Law, 332.

N. J. Law, 332). It there appeared that (Laws of New Jersey, 1869, p. 1038) the Legislature had enacted for the west shore of the Hudson river, at Jersey City, an exact copy of the New York statute as to the east shore. The captain of the Cunard steamship the "*China*" having refused to pay the fees of the harbor-master, was sued by the latter, and Judge DALRIMPLE, delivering the opinion of the Court, in which Judge BEDLE concurred, held that the question was *res adjudicata* under the opinion of Chief Justice CHASE, and that the imposition of these charges was unconstitutional as a regulation of commerce. While the Court followed the opinion of the Chief-Justice as *res adjudicata*, it also gives its own reasoning upon the subject, showing that the act called for no particular service on the part of the applicant for fees. This it is apprehended is the gist of the question in all the cases, whether the applicant be (as the New Orleans Port Wardens are called in the brief for the appellee), an "official witness," or whether he be, as in this case and that in New Jersey, clothed with some other power deemed by the Legislature to be for the general benefit of commerce, upon which the support of the officer is imposed. The fact that the Harbor-master's act was not altogether similar to that considered by Chief Justice CHASE was unimportant in this view, and the reasoning of the Court has its own independent force.

Result of these six cases.

The result of these six cases, allowing full weight to the conclusions of the earlier decisions, seems to be this: to justify local regulations as to the use of harbors, and to reject the idea that the cost of maintaining these regulations can be assessed on commerce.

As was said by Mr. Justice BRADLEY, sitting in circuit in the case of *Peete* v. *Morgan* (Trans. of Record No. 248, filed Nov. 13, 1872, p. 21), "The States have a right to "establish quarantine regulations for the preservation of "the public health, but they have no right to place toll-"gatherers at the gateways of commerce, and lay indis-"criminate exactions upon all vessels that enter thereby. "We think, therefore, that the tax, duty, or fee which is "complained of is unauthorized and void." Peete *vs.* Morgan (at Circuit).

This willingness to discriminate between the different sections of a statute has also been shown in this Court. In *Henderson* vs. *Mayor* (2 Otto, 259–269), Mr. Justice MILLER recognized such a discrimination as the result of the decisions in the two leading cases on this subject. He says: "So far as the authority of the cases of *New York* "vs. *Miln* and the *Passenger Cases* can be received as "conclusive, they decide that the requirement of a cata-"logue of passengers, with statements of their last resi-"dence and other matters of that character, is a proper "exercise of State authority, and that the requirement of "the bond, or the alternative payment of money for each "passenger, is void, because forbidden by the Constitu-"tion and Laws of the United States." While one requirement was sustained, as a regulation of police, the other was rejected, because a regulation of commerce. Result of decisions in New York *vs.* Miln and The Passenger Cases.

In reaching its conclusion, that the first requirement was a regulation, not of commerce but of police, and therefore valid, the Court assigns a reason, which may indicate that the sixth section, now under criticism, is not entitled to the support of that decision. Says Mr. Justice BARBOUR (for the Court, *New York* vs. *Miln*, 11 Peters,

Judge Barbour's test, to determine whether an act be a regulation of commerce or police.

102–133): "If we look at the persons for whose benefit it (the "statute) was passed, they are the people of New York "for whose protection and welfare the legislature of that "State are authorized and in duty bound to provide." That this cannot be averred concerning the Harbor-masters' act, appears from the following considerations:

The Harbor Master's Act designated with reference to commerce.

This statute is assumed (Brief for the Appellee, page 8, point I.) to be "in aid and furtherance *of commerce*," and its object declared to be (ibid, p. 10) "the most con-"venient and quiet location of vessels *for discharge and* "*reception of cargo*, and the prevention of disputes and "collisions among masters of vessels seeking *berths at the* "*wharves*." The enactment, therefore, was made with reference to the assumed wants of commerce, rather than for the preservation of peace in the community. The penalty for which the harbor-masters are authorized to bring suit, is solely for a neglect or refusal to move a vessel when such removal is directed, or for forcible opposition to the harbor-masters in the discharge of their duties (Record, Exhibit A, § 7). These officers are not authorized to make any arrest, nor have they any jurisdiction concerning any breach of the peace, felony or misdemeanor, all of which are guarded against by another body, the Harbor Police (Hoffman's Law relating to the City and County of New York, vol. 2, p. 304, §§ 163–173).

The Harbor Masters not clothed with powers of police.

Judge Barbour's test applied.

Considering it, therefore, as a statute "in aid and furtherance of commerce," and applying the test suggested by Mr. Justice BARBOUR (*supra*), who are the persons for whose benefit it must be assumed the Harbor-master's act was passed? Certainly, all those interested in the

ships, shipping or cargoes, as owners, masters, consignees, or purchasers, and excepting for the comparatively small number of these residing in the State of New York, the Legislature of that State was not and is not bound to legislate.

The Harbor Masters' Act affects all who are interested in commerce, entering the port of New York.

The enforcement of such local regulations in the harbor of the chief commercial city and distributing point of the Union concerns the people of the whole country who justly expect to receive and enjoy their portion of the cargoes at a lower cost because of the orderly disposition of the shipping at the port of entry.

The regulation of port fees a matter of interest to the whole country, and therefore to be under the control of its representatives.

Nor can it be maintained that the expense of enforcing these regulations is equitably distributed among the people by charging them upon the incoming cargo. On the contrary, the excessive dues at one port enhance the cost of goods received through it, as compared with those entered at another port situated at a greater distance from the interior towns, and consequently at a disadvantage with reference to trade. The customs of the United States are and must be uniform. The same principle is applicable here, and if commerce must bear the cost of maintaining the system of port regulations in all the harbors of the different states (notwithstanding these regulations may be properly imposed by the local authorities), the tax for such maintenance should be laid under laws sanctioned by Congress, with reference to the interests not of the seaport only, but of the interior States and the whole nation as well.

Mr. Justice MILLER well said, (20 Wall 583): "This "is a much wiser course, and Congress is a much safer "depository of the final exercise of this important power

Cannon *vs.* New Orleans, 20 Wall. 583.

"than the ill-regulated and over-taxed towns and cities "which are not likely to look beyond their own needs and "their own interests."

So far as a recognition of such fees by Congress is concerned, that body appears never to have taken any action with reference thereto, except to question their validity. The fact that the opinion of Mr. Solicitor Banfield received no further attention cannot be construed into the affirmative sanction which was necessary from Congress.

III.—*The payments are exacted under the New York law, not on account of particular services tendered or rendered, but, generally, whether services are rendered or not.*

General usefulness not sufficient to sustain such charges.

The decision in the *Steamship Company* vs. *The Port Wardens* (*supra*) demonstrated that it was not the general usefulness of an organization, but particular services rendered by it, which constituted the basis of a valid claim for payment.

Particular service not rendered under the New York law.

In the present case the appellee does not rest his claim upon the rendition of particular service, for the admitted allegation of the bill of complaint declares that these fees are exacted whether or not any services are rendered, and whether or not any services are required (Record, p. 4).

The learned counsel for the appellee takes some exception to the allegation that fees are exacted, "*whether services are rendered or not*," such exception being based entirely upon (what appears to be) the mistaken assumption that the allegation is framed in an improper alternative.

He refers to *Williams* vs. *Flight*, which clearly il-

lustrates the difference between the hypothetical statement, which is odious in pleading, and the phrase to which he now objects. Discussion as to alternative pleading.

In the cited case it was alleged that a certain bond *either* had been altered since execution, *or* its execution was obtained by fraud. In such a case a double hypothesis is propounded, inducing doubt as to which of two inconsistent allegations, in no wise dependent on the other, and calling for different sets of witnesses, will be urged.

In the present case the use of the allegation "whether or not" involves no such confusion. Instead of presenting a doubtful alternative it operates as an exclusive negative, narrowing the proposition to the single point that the appellee rests his claim to his fees not upon particular service, but upon the law itself. The allegation is not (as counsel seems to contend), this, "the defendant does or does not render service," but it is this "the defendant exacts such fees," and then in illustration of the persistency with which they are exacted is added the qualifying statement, "whether services are rendered or not." Meaning of phrase "whether or not."

The use of the contrasted positive and negative assertion is idiomatic in its expression of certainty. One promises to meet a given appointment at a certain time, "rain or shine," "sick or well," "whether or no." The statement is not that there will be *either* rain *or* shine; sickness *or* health, but it is that whatever may be the outward condition the pledge of the promisor will be kept. This is the single, simple, fact in assurance of which the absolute unimportance of any change in condition is asserted.

The phrase, "whether services are rendered or not," has become sufficiently positive for use in legislative enactments (Laws of Louisiana, 1855, p. 489; Portwarden's act) and in the opinions of this Court (6 Wallace, 31).

It is however stated by consent of counsel that since the cause is before this Court it is the common desire of all parties that its decision may be given as to the constitutionality of this sixth section as a provision of law independently of extraneous facts. As the learned counsel states, the demurrer was not aimed against this allegation, which was introduced for the information of the Court.

The proposition that the fees are exacted irrespective of the question of service does not however depend upon the allegation of the bill, but results necessarily from the terms of the law itself.

Analysis of similar law by Supreme Court of New Jersey as to question of service.

As was said by Judge DALRIMPLE, in construing the similar New Jersey statute (*Hackley* vs. *Geraghty*, *supra*): "It may be said "that our act is unlike "the Louisiana act in that the latter expressly pro- "vides that the port wardens shall be entitled to "demand and receive their fees, whether called "upon to perform any services or not for every vessel "arriving in the port of New Orleans, and ours con- "tains no such provision. The effect of our act is, "however, the same as if the words of the Louisiana act "had been contained therein. The commanders, owners, "and consignees of all ships and vessels which come with- "in the limits of Jersey City or Hoboken, and load or "unload, or make fast to any wharf therein are made lia- "ble to the payment of the prescribed fees. * * *

"* * * * It will thus be perceived that the liability of vessels engaged in foreign trade to the tax or assessment provided by the act does not depend upon the fact that the services of the harbor-masters are required. By the express terms of the act, the master, owner, or consignee of any ship or vessel subject to the payment of fees to harbor-masters as aforesaid, shall, within forty-eight hours after the arrival of such ship or vessel, pay the fees so due thereon at the office of the said harbor-masters. * * * * * * * * The fees are payable within forty-eight hours after the vessel comes within the city limits, and loads or unloads, or is made fast to any wharf therein, *whether such wharf be public or private, or the property of the persons from whom the fees are collected, or another.*"

Analysis of similar law by Supreme Court of New Jersey, as to question of service.

IV.—*The payments are exacted under the New York law, not for the benefit of individuals, but indirectly for the benefit of the State.*

One of the reasons advanced in support of the payment of half pilotage fails in the present case. Here is no body of individuals of especial competence, acquired through training or experience, for rendering beneficial service to commerce. Their only special qualification for their duty is the commission of the State of New York, whose servants and officers they are. If the fees of these officers were not paid by commerce, they would have to come, as do those of the public officers generally, out of the public purse. Therefore, every dollar paid for

Payments made for benefit of State Treasury.

this purpose by the owners of ships is a dollar saved to the treasury of the State of New York.

Alexander *vs.* R. R. Co., 3 Strob. (S. C.), 599.

It was well said by Judge O'NEALL in *Alexander* vs. *R. R. Co.*, 3 Strob (S. C.), 599-600: "But is it "clear that the imposition here does not indirectly "avail the public? Who is the harbor master? He "is an officer of the corporation, exercising *pro hac* "*vice* the authority of the State the legislative "power. He is to be paid for his services by the ap- "pointing power, and if it, instead of drawing from its "own funds for that purpose, chooses to relieve them by "imposing the burden on the defendants, is not that the "same thing as if the results of the charges arising under "this ordinance had been directed to be collected and "paid into the city treasury? It seems to me to be so."

Governmental functions not to be bartered.

In this connection it may be observed that it is not usual for government to barter its protection, or to traffic in its governmental functions. If a State establishes a police force for the suppression and prevention either of crimes or of fires, it supports the system, not by assessments on the owners of the property rescued, but out of the public treasury. If it creates a judiciary, the courts, though their services may be invoked by comparatively a small number of the tax-payers, are sustained at the expense of the whole body, and not by exactions from the suitors or litigants to whom their services have been rendered. Our government does not assume to charge the cost of its system of light-houses and buoys upon the commerce which receives the direct benefit, but rather considers the duty of providing safe channels for navigation, whether

domestic or foreign, a burden to be discharged from the national exchequer. The whole people is interested in the support of these organizations and should therefore support them. A sovereign does not make the exercise of its sovereign powers dependent on the payment of a pecuniary equivalent.

Conclusion. The sixth section of the New York law an unconstitutional regulation of commerce.

Upon principle and authority, therefore, the appellant claims that the sixth section of the New York law is void in this that it is an unconstitutional regulation of commerce.

SECOND SPECIFICATION OF ERROR.

The act of the Legislature of the State of New York, under which alone the defendant claims right to collect fees of one and one-half cents per ton of plaintiff's steamships is invalid, in so far as it seeks to lay a duty of tonnage without any consent of Congress, which by the tenth section of the first article of the Constitution it is forbidden that any State shall do.

An independent objection.

It is to be observed that this objection is in no way dependent on the maintenance of the previous one. It is entirely separate and disconnected from that.

Tonnage duty. Application of restriction.

The restriction now under consideration, as was observed by Chief Justice MARSHALL (*Gibbons* vs. *Ogden*, 9 Wheat, 203), applies solely to the taxing power which bears no analogy whatever to the power of regulating commerce (p. 200), though it is possible to impose such a duty with a view to the regulation of commerce (p. 202).

The former restriction applied only to foreign and interstate commerce; this forbids the imposition of duties upon any instrument of commerce, even when owned and operated entirely within a State.

Tonnage duty.

"Tonnage duties," says Bouvier, "are duties on vessels in proportion to their capacity."

Definitions.

Said Mr. Justice CLIFFORD in the *State Tonnage Tax cases* (12 Wall, 204): "Tonnage, as applied to American "ships and vessels, must be held to mean their entire in- "ternal cubical capacity, or contents of the ship or vessel "expressed in tons."

Chief Justice CHASE, in the *Steamship Company vs. The Port Wardens* (6 Wall, 34), extended this meaning, saying, "In the most obvious and general sense it is true "those words describe a duty proportioned to the tonnage "of the vessel; a certain rate on each ton," but "it was "not only a *pro rata* tax which was prohibited, but any "duty on the ship, whether a fixed sum upon its whole "tonnage, or a sum to be ascertained by comparing the "amount of tonnage with the rate of duty."

Tonnage duty. Distinctive features.

The distinguishing feature of this tax is, as was observed by Mr. Justice CLIFFORD (State Tonnage Tax Cases), that

it is levied upon vessels "wholly irrespective of the value "of the vessels as property, and solely and exclusively on "the basis of their cubical contents." (The last clause of the proposition would, of course, not be understood to apply to such cases as that from New Orleans, where a fixed sum was assessed upon each vessel; though it is true that such sum would be levied "wholly irrespective of the value of the vessel as property.")

Duty of tonnage, distinctive features.

Perhaps no better illustration can be given of what the framers of the Constitution understood by a "duty of tonnage" than a citation of the title, and two sections of an act passed by the Legislature of the Province of New York February 26, 1772, and, of course, well known in its operation to the members of the convention. It is as follows (Van Schaack, Vol. 1, p. 633):

"CHAP. MDXV.

A Provincial act creating a duty on tonnage,

"*An Act to lay a* DUTY OF TONNAGE *on vessels for "defraying the expense of the light-house at Sandy "Hook:*

"*Whereas*, It is very reasonable that the expense of "maintaining the light-house should be paid by those "who receive the immediate benefit thereof, and for whose "use it was erected.

"1. *Be it, therefore, enacted* by his Excellency, the "Governor, the Council, and the General Assembly, and "it is hereby enacted by the authority of the same: That "all vessels as often as they shall come into the port of "New York during the continuance of this act shall pay "a TONNAGE of one penny half-penny for every ton "such vessel or vessels shall measure according to the rule

" nereinafter mentioned, except the vessels herein particu-
" larly excepted."

It seems clear that to avoid such local impositions as this, the constitutional prohibition was inserted. It is, also, worthy of notice, that in the locality to which the law applies; the rate and mode of ascertainment of the duty; the general purpose to which it was applicable; and the argument of the preamble by which it was supported, there is a singular resemblance to the harbor-master's act, and the reasoning in support thereof.

The question as to whether or not the imposition authorized by a State law, constituted a duty of tonnage as thus defined, has been frequently presented to the Courts.

Decisions upon which alone the restriction as to tonnage duties seem to have been avoided. Cooley *vs.* Board of Wardens, and Benedict *vs.* Vanderbilt.

The only unreversed decisions tending to avoid the effect of this constitutional prohibition are those in *Cooley vs. The Board of Port Wardens*, and *Benedict vs. Vanderbilt*, before cited. As the last case depends entirely on the first one, they may be considered together.

Judge CURTIS held that the law imposing " half pilotage" constituted no duty on tonnage, and why? Because " this " provision of the Constitution was intended to operate " upon subjects actually existing and well understood " when the Constitution was formed, and imposts and " duties on imports, exports and tonnage were then known " to the commerce of the civilized world to be as distinct " from fees and charges for pilotage, and from the penal- " ties by which commercial States enforced their pilot

" laws, as they were from charges for wharfage or towage, " or any other local port-charges *for services rendered* to " vessels and cargoes, and to declare that such pilot fees " or penalties are embraced within the words imposts or " duties on imports, exports or tonnage would be to con- " found things essentially different, and which must have " been known to be actually different by those who used " this language." (And, on page 314), " It cannot be de- " nied that a tonnage duty or an impost on imports may " be levied under the name of pilot-dues or penalties, and " certainly it is the thing, and not the name, which is to " be considered. *But having previously stated that in " this instance the law complained of does not pass the " appropriate line which limits laws for the regulation " of pilots and pilotage, the suggestion that this law levies " a duty on tonnage is not admissible.*"

Decisions apparently avoiding restrictions as to tonnage.

The italicised words indicate the limitations of this decision. *For services rendered* local charges might always be imposed; and, in the case then before the court, the charge imposed was in consideration of service tendered so as to establish a *quasi* contract that it should be compensated. This, therefore, was no duty of tonnage.

In the case now before the court we have a law which imposes a charge irrespective of service, and where, as the pleadings show, payment is demanded, whether or not service is rendered or required. It can, therefore, be supported under the decision of Judge CURTIS, only if general usefulness to commerce is sufficient to constitute a basis for the charge.

General usefulness to commerce affords no basis for specific charges on vessels. Steamship Co. *vs.* Port Wardens, 6 Wall, 34.

The language of Chief Justice CHASE, in the New Orleans case, entirely disposes of such a proposition. He says (p. 34): "It may be true that the existence of such a "body of men is beneficial to commerce, but the same is "true of the government of the State, of the city, of the "government of the courts, of the whole body of public "functionaries. If the constitutionality of the charge for "the benefit of the masters and wardens can be maintained "upon the ground that it secures compensation for services, "it is difficult to perceive upon what grounds the consti-"tutionality of any State law imposing taxes for the bene-"fit of the State government upon vessels landing in its "ports can be questioned."

Sheffield *vs.* Parsons, 3 Stew. & Port. 302.

The same line of reasoning had been previously presented in the case of *Sheffield* vs. *Parsons*, in the Supreme Court of Alabama, by Judge SAFFOLD, delivering the opinion of the Court. Considering a law of exactly the same purport as the New York Statute, the judge says (3 Stewart *vs.* Porter, 302–306): "If it be conceded that "the State can thus lay duties to compensate the "harbor-master, would not the principle authorize com-"pensation to the wardens and all the pilots in the "same way, and might not a variety of other ex-"penses be provided for in like manner, among others, "the support of a city hospital. If a duty of three cents "per ton be authorized *without any* PARTICULAR *services* "*rendered*, why not ten or fifty to meet the various ob-"jects alluded to?" He then says: "Compensation "chargeable against the owners or consignees of vessels "entering the port *for particular services necessarily* "*rendered or specially requested* should be viewed in a

No charge authorized except for particular services.

"different light. Then there would be something in the "nature of a *quid pro quo*—a criterion by which un- "reasonable exactions could be avoided, and something "by which to distinguish such charges from imports or "duties."

As it appears to counsel that the reasoning of these two opinions demonstrates the inapplicability of Judge CURTIS's decision, we proceed to a consideration of the several reported cases establishing the unconstitutionality of such laws.

Cases holding charges of Harbor Masters or Wardens to be duties of tonnage.

The first is that of *Sheffield* vs. *Parsons* (*supra*), decided in 1833. The ninth section of an Alabama statute, entitled "An act for the Government of the Port and Harbor of Mobile" (passed in 1822), provided as follows: "The harbor-master shall have power to demand and "receive from the commander, owner, or consignees, or "either of them, of every ship or vessel that may enter "the port of Mobile, and load, unload, or make fast to "any of the wharves within the limits of said city, at and "after the rate of three cents per ton, to be computed "from the tonnage expressed in the register of such ships "or vessels respectively, and no more." This provision, it will be noticed, is exactly the same in effect as the sixth section of the New York law.

(1) Sheffield *vs.* Parsons, 3 St. & P. 302.

The Court distinguishes and defines the prohibitions in the second clause of the tenth section of the first article of the Federal Constitution, and says (p. 305) that, while imposts or duties on exports or imports may be levied by a State so far "as may be absolutely necessary for execut-

Sheffield *vs.* Parsons, 3 Stew. & Port. 302.

"ing its inspection laws," the prohibition against levying duties of tonnage admits of no qualification whatever. It is as absolute as that against keeping troops or ships of war, forming compacts, or engaging in war. It being suggested that the inhibition was intended only to restrict the States from laying any duty upon tonnage for their own benefit or to provide a revenue, the Court further says (p. 306): "Admitting, as I presume to be true, "that this was one of the prominent objects I cannot "suppose it to have been the only one. The principle of "the distinction will equally apply to toll or duties laid "for any other purpose in proportion to the amount; the "effect on commerce would be the same whatever be its "application. The general design I apprehend to have "been to deny to the States the power to clog or burden "commerce or subject it to restrictions beyond the neces- "sary expense of inspection, except according to the dis- "cretion of Congress."

Accordingly (pp. 304–305), as the ninth section of the Alabama law declared the charges in question to be for loading and unloading or making fast to any of the wharves, and this, too, whether any services *in the particular case* were required of or rendered by the harbor-masters or not, and whether the vessel had entered the corporate limits of the city or not, the provision was held to constitute a duty on tonnage and therefore to be void.

It is impossible to distinguish this statute from the New York law in the particulars complained of.

The next case was that already often referred to, the *Steamship Company* vs. *The Port Wardens*, where Chief Justice CHASE held the Louisania statute to impose not only a regulation on commerce, but also a duty of tonnage.

Wardens charge a duty of tonnage.
(2) 6 Wall. 34.

Thereupon, the Supreme Court of New Jersey, in *Hackley* vs. *Geraghty* (*supra*), accepted this case as decisive, and when the New Jersey statute, which is an exact copy of the New York law, was presented for consideration, declared the question to be *res adjudicata* and said: "In express terms the fees of the harbor-masters are to "be ascertained upon the basis of a certain percentum "per ton, to be computed from the tonnage expressed in "the registers or enrollment of the vessel. In short, the "ship-owner is made liable to the payment of a duty of "half a cent per ton upon the entire tonnage of his ship. "This comes within the express prohibition of the Consti-"tution."

Harbor masters charge a duty of tonnage.
(3) Hackley *vs.* Geraghty, 34 N. J. Laws. 332.

Afterwards, this Court passed upon the statutes of Alabama, which assumed to impose a tax, per ton, upon vessels owned and operated entirely within the State. The Court, by Mr. Justice CLIFFORD, said "that though taxes "levied by a State upon ships and vessels owned by the "citizens of the State as property, *based on a valuation* "*as property*, are not within the prohibition of this Con-"stitution, it is equally clear and undeniable that taxes "levied by a State upon ships and vessels as instruments "of commerce and navigation, are within that clause of "the instrument which prohibits the States from levying "*any duty of tonnage*" (*State Tonnage Tax Cases*, 12

Though States may tax ships as property the tax must not be per ton.
(4) 12 Wall. 204.

Wall, 204–213). It is, however, to be conceded that the Court intimates (p. 220) that as the "act in question sought to raise revenue without any corresponding or equivalent advantage to vessels taxed or to the ship owners, consequently it could not be upheld by virtue of the laws regulating pilot dues and port charges," referring to *Benedict* vs. *Vanderbilt* (*supra*).

That this suggestion of the learned Justice was not even by him considered to indicate that all such port charges would be sustained is evident from the subsequent decision of this Court in *Peete* vs. *Morgan* (19 Wall, 581), in which he concurred. It was there held that even to defray the expenses of quarantine regulations, a State cannot impose a tonnage-tax on vessels owned in foreign ports and entering her harbors in pursuit of commerce. Says Mr. Justice DAVIS (p. 583): "It is evident that the power "to establish quarantine regulations cannot be executed "without the State possesses the means to raise a revenue "for their enforcement, but it is equally evident that the "means used for this purpose must be of such a character "as the restrictions imposed by the Federal Constitution "upon the taxing power of the States authorized. We "are not called upon in this case to go into the general "subject of the limitation imposed by these restrictions, "because the tax in question is manifestly outside the "jurisdiction of the State to impose, as it is 'a duty of "'tonnage' within the meaning of the Constitution."

Though a quarantine system is proper, the State cannot support it by levying a tax per ton on shipping. (5) 19 Wall, 581.

This Court, therefore, affirmed the conclusions of Mr. Justice BRADLEY, sitting at Circuit, where he said: "In "this case we think that the charge which, by act of the

"legislature, is authorized to be exacted from all vessels "coming to the quarantine ground, namely, $5 for the "first one hundred tons, and one and one-half cents for "every additional ton, is a duty of tonnage within the "meaning of the Constitution." Mr. Wallace's report of the case in this Court shows that the case was supposed to involve a reconsideration and explanation of the general phrases with reference to quarantine laws, etc., used in *Gibbons* vs. *Ogden* (*supra*).

Peete *vs.* Morgan at Circuit.

In October, 1874, it was, as is noted by Judge Cooley (on Taxation, p. 62) *authoritatively* determined by this court, in the case of *Cannon* vs. *New Orleans* (20 Wall, 577), "that a tax on vessels at a certain sum 'per ton' is forbidden." It was there held that an ordinance of the City of New Orleans, which demands of all steamships which should moor or land in any part of the port of New Orleans a sum measured by the tonnage of the vessel, is a tonnage tax within the meaning of the Federal Constitution, and therefore void.

(6) Cannon *vs.* New Orleans, 20 Wall, 577.

In delivering the opinion of the Court, Mr. Justice Miller said of the restriction as to tonnage duties, (p. 581) "whatever more general or more limited view may be "entertained of the true meaning of this clause, it is "perfectly clear that a duty, or tax, or burden, imposed "under the authority of the State, which is by the law "imposing it, to be measured by the capacity of the vessel "and is, in its essence, a contribution claimed for the privi- "lege of arriving and departing from a port of the United "States, is within the prohibition." That the New York statute declares that the tax or fees shall be "measured by

the capacity of the vessel is conceded: that in its essence it is "a contribution claimed for the privilege of arriving and departing from the port of New York" is clear, since it is always claimed whether service be rendered or not. (Trans. of Record, fol. 4).

Having reference to the proposition that service or benefit might possibly result from the existence of wharves, the Court said: "Nor do we see any reason why, "when a city or other municipality is the owner of such "structures, built by its own moneys, to assist vessels "landing within its limits in the pursuit of their business, "the city should not be allowed to exact and receive its "reasonable compensation as well as individuals, but in "the exercise of this right, *care must be had that it is not "made to cover a violation of the Federal Constitution in "the point under consideration*" (p. 582).

Conclusion—The sixth section of the New York law, an unconstitutional duty of tonnage.

In view of this uniform current of recent decisions, and of the fact that *Benedict* vs. *Vanderbilt* alone holds the contrary, as well as upon consideration of the principles applicable to the subject, there can be no doubt that the sixth section of this New York law is absolutely void as imposing a duty of tonnage.

Its express terms prescribe such a duty, and even if this were exacted in payment for particular services, it would be improper to provide in this manner for such payment.

THIRD SPECIFICATION OF ERROR.

The relief prayed for in the plaintiffs' bill of complaint should have been granted in the Court below.

Of course, if, as has been contended, the sixth section of the New York statute is unconstitutional, the defendant is and was without authority to collect the fees which are prescribed therein.

The plaintiff's procedure correct.

The plaintiff, in that view of the case, adopted the proper procedure to protect itself against the threatened wrong of the continued collection of these fees.

An injunction was sought to prevent the irreparable injury and the multiplicity of suits, both of which, it is averred and conceded, would otherwise result to the plaintiff.

An injunction necessary to avoid irreparable injury and multiplicity of suits.

A failure to pay the fees, subjects the owner of the vessel to a penalty of twice their amount, and for the payment of this penalty any one of these vessels, forming part of a line running at regular intervals between New York and Liverpool, is exposed to immediate seizure. The consequent injury of the entire business of the plaintiff is inevitable and irreparable, especially in view of the fact that the operation may be repeated thirty-one times in each year, and thirty-one actions may be brought concerning the same subject.

Though the right to the attachment is not given to the

appellee, in this statute, the fact that the rights conferred by this act form the basis upon which an attachment may be obtained, under the general law of New York, makes the act as burdensome to the appellant as though it contained the provision.

Peete *vs.* Morgan, at Circuit.

Said Mr. Justice BRADLEY, at Circuit, in *Peete* vs. *Morgan*, (*supra*), "whilst the complainant might by successive actions at law, recover the amount exacted, this "Court, as a Court of Equity, in order to prevent a "multiplicity of suits, has a right to entertain a bill for "an injunction. We therefore, grant the injunction, as "prayed."

See also *Osborn* vs. *U. S. Bank*, 9 Whea., 738–938; *State Tonnage Tax Cases*, 12 Wall, 204; *Peete* vs. *Morgan*, 19 Wall, 591; and *Henderson* vs. *The Mayor*, 2 Otto, 270.

Conclusion.

The decree appealed from should be reversed, and the case remitted to the Circuit Court, with directions to make the injunction prayed for in the bill of complaint, perpetual.

WILLIAM M. EVARTS,
FRANCIS LYNDE STETSON,
Of Counsel for Appellant.

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1876.

No. 937.

THE INMAN STEAMSHIP COMPANY,
(*Limited.*)
Appellant,

vs.

EDWARD G. TINKER,
Acting Captain of the Port of New York.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEE.

HENRY J. SCUDDER,
Of Counsel for the Appellee.

New York:
E. WELLS SACKETT & BRO., LAW, BOOK AND JOB PRINTERS,
CORNER PINE AND WILLIAM STREETS.
1876.

Supreme Court of the United States.

THE INMAN STEAMSHIP COMPANY (Limited),
Plaintiff & Appellant,

vs.

EDWARD G. TINKER, Acting Captain of the Port of New York,
Defendant & Appellee.

Brief of Appellee.

STATEMENT OF CASE.

This appeal is from a decree of the Circuit Court for the Southern District of New York, in favor of Appellee against Appellant.

The plaintiff and appellant, filed a bill in equity against the defendant and appellee alleging that the plaintiff is an alien, and is owner of three steamships belonging in England and running between Liverpool in England and the port of New York, carrying passengers and freight, and arriving in New York on an average three times in every five weeks (fol. 4), *and load or unload and make fast to a wharf therein* (fol. 6) of Record.

That the defendant and appellee is Captain of the Port of New York, and as such under a statute of the State of New York, made part of the complaint

and entitled "An act defining and regulating the powers, duties and compensations of the captain of the port and harbor masters of the Port of New York, passed May 22d, 1862, and amended April 27th, 1865, exacts from plaintiffs the fees prescribed by said act (fol. 5) of Record.

These fees are one and one-half cent for each ton of the vessel.

That if plaintiff refuses to pay defendant will sue and recover from him and attach his vessels.

That the fees are demanded whether services are rendered or not.

That plaintiff fears a multiplicity of suits if he refuses to pay—that the act pleaded is in violation of the Constitution of the United States, and therefore void, and he prays the equitable and restraining powers of the Court in his behalf.

To this Bill of Complaint the defendant demurred generally.

The demurrer was sustained in the Circuit Court, and the plaintiff appealed to this Court from the decree entered thereon.

It is apprehended on the part of appellee that the appellant's argument will turn solely upon the propositions.

1st. That the statute in question is a regulation of commerce, and therefore unconstitutional.

2d. That in imposing fees upon the tonnage of vessels it contravenes the 10th section of the 1st article of the Constitution, and is therefore invalid.

It is not supposed that a point will be made upon the propriety of a demurrer, because the bill alleges that fees are exacted "whether services are rendered or not," or whether services are required or not," in view of the further allegation that the vessels of appellants' when they enter the port of New York "*make fast to a wharf therein.*"

The pleading would be demurrable for special reasons if there were doubt as to its true meaning in this connection. Its interpretation seems clearly to be that the "vessels enter the port of New York, make fast to a wharf, and load and unload, and defendant exacts fees in some such cases, although he gives no direct services and none are asked."

The demurrer was not aimed at the technical form of pleading, but the want of equity in bill for assailing the statute, and seeking the protection of the writ of injunction against the payment of valid port dues.

The alternative allegation "whether services are rendered or not," permits the defendant to adopt the one part he chooses, and here he adopts that alleging "services are rendered." Again this form of pleading is fatal to the prayer for equitable relief, inasmuch as it admits of but one instance where services are not rendered, and if that caused injury it could be redressed at law.

Atty. Gen. *v.* Mayor of Norwich, 2 Myl & Cr., 406.
Williams *v.* Flight, 5 Beav. 41.

This explanation is submitted in view of the obvious intent to liken this case to that of the "Steamship Co. *v.* Master & Wardens, 6 Wall. 31," where the phrase "whether services are rendered or not," occurred in a statute under consideration by the Court, and was used in its opinion.

It will hereafter be shown that the Master and Wardens of New Orleans, composed a body similar to the "Wardens of the Port of New York," and entirely dissimilar to "the Harbor Masters of New Orleans" or to "the Harbor Masters of the Port of New York."

Assuming then that the questions presented will be those of constitutional validity, a brief history of the Harbor Masters of the port of New York as furnished by its laws is not unbecoming.

Under the Dutch government the duty of enforcing regulations concerning the shipping in the harbour and the places where vessels might anchor was imposed upon the Fiscal,

Laws of New Netherlands,

In 1691 the Mayor, Aldermen and Common Council were authorized to appoint one or more discreet and intelligent persons to be the surveyors or supervisors of the buildings, streets, *wharves* docks, &c., and to see that the same be conveniently regulated for the accommodation of habitation, *shipping*, &c.

Bradford's Laws, p. 12.

In 1731 the corporation of New York City passed an ordinance entitled "A law for regulating the "lying of vessels in the docks and wharves of this "city," under this law the *Dock Master or Haven Master* had power to regulate the position of vessels mooring at the docks, and fees were to be collected by him. Fines and penalties for infringment of the act were provided, of which, the Haven Master was to retain one half as his own compensation.

Ordinances by Corporation of New York 1731, p. 16.

During the military control of the City of New York by the forces of Great Britain, civil laws gave

way, and the regulation of the shipping at the wharves and in the harbor was controlled by orders of commandants to the superintendent of the port.

Valentine's Manual, 1863.

Act of March 10, 1791, entitled "An Act to prevent obstructions to docks and wharves in the City of New York" enacts, among other provisions, the following:

"Upon the neglect or refusal of the master or owner of a ship to remove his vessel backwards or forwards at the same wharf, at the direction of any *wharfinger* having charge of such wharf, or of the owner thereof, such master or owner shall pay to such wharfinger or owner five pounds, to be recovered before any Court having cognizance."

These wharfingers were appointed under various Acts by the owners of the respective wharves. See Acts of 27 January, 1770, (1 Van Schaak, 563), 16 February, 1771, (Ibid, 625), and 17 April, 1784, (1 Greenleaf, 92.)

The Act of April 1, 1796, authorizes the appointment of a *Harbor Master*. His duties were: To regulate the station of all vessels in the rivers and at the wharfs; to determine when the masters of vessels shall accommodate each other by removal, &c., and if they refuse so to remove, to sue for a penalty which shall be recovered for the benefit of the hospital; to superintend the execution of all laws for cleansing docks and wharves, and removing nuisances in or upon them.

Harbor Master to have power of appointment and removal of deputies, and to "Demand and receive "from the commander, owner or owners, consignee "or consignees, or either of them, of each and every "ship or vessel that may enter the Port of New

" York, *and load, unload or make fast to any* "*wharf therein, at and after the rate of one cent* "*per ton, to be computed from the tonnage expres-* "*sed in the registers of such ships and vessels re-* "*spectively, and no more.*" 3 Greenleaf, 317.

Act of April 3, 1801, re-enacts the Harbor Master's Act of 1796. (See 2 K. & R. 133.)

Legislation upon the subject of Harbor Masters in New York from 1796 to the present need not be cited. It presents no change in the functions and few in the powers of this port officer. In Revised Laws of New York 1813, 2d vol., p. 448, the duties and powers of the Harbor Master are those of 1796 and those of 1876. They are confined to the convenient location of vessels in the stream and at the wharves, to facilitate the discharge of cargoes, by assignment of berths, and that general orderly regulation of contending claims among masters, without which regulation, confusion and disaster would prevail, and in numerous instances run to violence and collision.

These powers are found at fols. 13, 14, of Record. and are as follows:

§ 7. Each harbor master shall have power, within the district assigned to him, to provide and assign suitable accommodations for all ships and vessels, and regulate them in the stations they are to occupy at the wharves or in the stream, and to remove from time to time such vessels as are not employed in receiving or discharging their cargoes, to make room for such others as require to be more immediately accommodated for the purpose of receiving or discharging their cargoes, and shall have power to determine as to the fact of their being fairly and in good faith employed in receiving or discharging their cargoes, and shall have authority to determine

how far, and in what instance, it is the duty of the master and others having charge of ships and vessels to accommodate each other in their respective situations. And if any master or any person having charge of any vessel, canal boat, barge or lighter, shall refuse or neglect to move his vessel, canal boat, barge or lighter when ordered to do so by the captain of the port, or by a harbor master, or shall resist or forcibly oppose said officers in the discharge of their duties, such master or person so refusing, neglecting, resisting, or opposing, shall for every such offense, forfeit and pay the sum of fifty dollars, to be recovered with costs of suit by and in the name of the captain of the port, before any Court having cognizance thereof.

It may be properly observed here, that State or City ordinances of similar character to the above acts, exist and control the shipping of all the large ports of our seaboard and lakes, however the officer charged with their execution may be styled, whether *Police, Haven Masters, Harbor Masters, or Wharfingers.*

In Louisiana, Harbor Masters for the port of New Orleans have long been known and possessed of powers almost identical with those conferred by the statute of New York as cited above, and it is not known that the Acts creating them have been questioned in this Court.

See Act entitled "Harbor Master" Laws of Louisiana, 1855, p. 483.

The statute of Louisiana considered by the Court in "Steamship Co. *vs.* Master and Wardens, 6 Wall, 31," was one providing for the "Master and Wardens of the Port of New Orleans," and in no manner touched upon or affected the Harbor Masters. The Master and Wardens, like the Port Wardens of New York, were empowered to

visit and examine all vessels entering the Port of New Orleans, examine their cargoes and certify as to condition thereof and make charges therefor, and in addition "*whether they rendered any services or not*," were authorized to charge and collect five dollars from every vessel entering the Port.

Laws of La., 1855, p. 488.

This act so plainly imposed a tax upon commerce, without even the pretense of an equivalent in service or protection, that it required small argument to demonstrate its invalidity. It presented none of the features of a quarantine, inspection, pilot or police ordinance. It simply taxed each vessel entering the port five dollars. It obviously imposed a burden upon commerce.

ARGUMENT.

I.

The acts of the Legislature of New York establishing Harbor Masters and defining their powers, is not a regulation of commerce within the intendment of the Constitution of the United States, but an exercise of a power reserved to the State for the proper government of its citizens, and those within its jurisdiction. It is in aid and furtherance of commerce, and not to its hindrance.

The special scope and character of the statute can be gathered from its internal evidence without considering the peculiar nature of the subject and location upon which it operates; but with the latter under view, it loses every feature of that interference with commerce designed by the Constitution to be forbidden the States, and falls directly within the class of legislation not only allowed to the States in the absence of Congressional action, but

that cannot, save in extraordinary instances, be assumed by the national legislature. It is purely and simply the exercise of a police power and creates a special body of officers, clothed with police power, and no others.

First looking at the act by itself:

It determines the residence of the officers it creates; limits that residence to the great cities along whose wharves and shores their duties lie, and prohibits their ownership or interest, directly or indirectly, or even their agency in or for any "steam-tow boat, tug boat, ship, vessel, canal boat, barge, or lighter navigating the port of New York.

Fol. 9 of Record, § 1 of Act.

Thus this officer is made independent of personal influences and freed from the temptations that might incline to preferences and incidentally obstruct the free flow of commerce.

In order to the better performance of his functions he is restricted in his jurisdiction to a territorial district and forbidden to collect any fees, except by permission of his superior, the Captain of the port. He can receive no reward or valuable thing for his services, except the fees that come to him by the provisions of the act.

Fols. 14, 15 of Record.

Penalties attend remissness, and he may be imprisoned for a violation of the act. A special mode for his trial, and suspension in the meantime, is provided, and for any malfeasance or neglect the Governor may promptly remove him.

Superadded to these restrictions and penalties—all of which are characteristics of a police or constabulary force—come the specifications of powers,

(and these are purely of a police character), to reinforce and establish the proposition that the Harbor Masters are *special policemen*, organized for the due regulation order and safety of shipping at the wharves of New York.

The actual power conferred, may be fairly defined as this: "*the most convenient and quiet location of vessels for discharge and reception of cargo, and the prevention of disputes and collisions among masters of vessels seeking berths at the wharves*," Section 7 of the Act, may be reduced to this. There is an authority to *provide* as well as to locate, but it will hardly be contended that the term *provide* passes in force beyond the usual duty of a wharfinger. It is not used in the sense of "construction" or such connection as would justify the argument that it involves the enlargement or constriction of the port.

Plainer police attributes rarely stamp special organizations. The preservation of order and peace is paramount throughout the statute; that is its sole purpose. To achieve this end, its agents are subjected to peculiar conditions, to severe penalties, disqualified to hold or be interested in property essential to commerce, liable to instant removal for neglect or ill doing. They are stripped of important privileges and personal rights that they may disinterestedly perform duties as delicate as they are necessary. That the subject of these duties is an instrument of commerce in no way destroys the character of the officer discharging them. The habitual policeman of New York City is daily called to prevent disturbances and offences among the shipping, both in stream and in dock. The limited function of the Harbor Master in the respect of arrest, emphasises the intent of the State Legislature not to regulate commerce in the broad scope of the Federal power, but only to exercise such precau-

tion and preventive measures as would further its object and enforce comfort and tranquility. It would be difficult to measure the calamities attendant upon a general contest for place and preferment in a great commercial port with no special authority to decide, no special power to instantly regulate, but instead, a remission to judicial tribunals of disputes and collisions between those practically engaged in the management of vessels.

Certainly the adoption by a State of precautionary regualtions in this behalf cannot encroach upon the wide powers of Congress farther, if indeed, so far, as the establishment of health rules, and the latter are now and have been regarded by this Court as within the proper exercise of the reserved rights of the State governments.

The moral health of a community ranks higher in every respect than its physical. The latter may be controlled by the prudence and good sense of its subjects, or the mere change of seasons, but the former demands, as yet, legislation and agents to enforce it.

Who can picture the confusion, disaster and crime, that would spring from the absence of efficient port regulations in a great harbor like New York, where the vessels of every commercial nation resort, where seamen of every color and climate are found upon them, and where the press for position at favored piers would, at seasons, overwhelm the capacity possible to be afforded?

It will be urged that the demands for necessary regulation, can be supplied by Federal Legislation. Undoubtedly any competent legislation that can be enforced would answer the object, but as yet there is no national action upon this subject, and very sufficient state enactment, and the latter has been

supported by this Court upon the acceptable grounds of the reserved right of the State, of the greater convenience and propriety of State Jurisdiction, and in some cases, where the powers of the General and State Government, so blend and interweave, that doubt attended their discrimination, upon the absence of action by the former.

The following authorities are pertinent to this branch of the argument and are believed to fully support it: In *Gibbons* v. *Ogden*, 9 Wheaton, 591, Chief Justice Marshall says: "It is no objection to "the existence of distinct substantive powers, that in "their application they bear upon the same subject. "The same bale of goods, the same cask of pro- "visions, or the same ship, that may be the subject "of commercial regulation, may also be the vehicle "of disease. And the health laws that require them "to be stopped and ventilated, are no more intend- "ed as regulations on commerce than the laws which "permit their importation are intended to inoculate "the community with disease. Their different pur- "poses mark the distinction between the powers "brought into action; and while frankly exercised, "they can produce no serious collision.

"As to laws affecting ferries, turnpike roads and "and other subjects of the same class, so far from "meriting the epithet of commercial relations, they "are, in fact, commercial facilities, for which, by the "consent of mankind, a compensation is paid, upon "the same principal that the whole commercial world "submit to pay light money to the Danes." And again, in the same case, speaking of inspection laws, the Court say, "they form a portion of that immense "mass of legislation which embraces everything "within the territory of a State not surrendered to "the General Government all which can be most "advantageously exercised by the states themselves. "Inspection laws, quarantine laws, health laws of "every description, as well as laws for regulating the

"internal commerce of a State, and those which re-
"spect roads, turnpikes, ferries, &c., are component
"parts of this mass. No direct general power over
"these objects is granted to Congress, and conse-
"quently they remain subject to State legislation."

The orderly regulation of the wharf would seem to fall within this rule quite as properly as the regulation of the street of which it is a part.

In the City of New York *v.* Miln., 11 Peters, 139, the Court say, "that a State has the same undenia-
"ble and unlimited jurisdiction over all persons and
"things within its territorial limits as any foreign
"nation where that jurisdiction is not surrendered
"or restrained by the Constitution * * * that
"all these powers which relate to merely municipal
"legislation, or that may perhaps be more properly
"called *internal police* are not thus surrendered or
"restrained, and consequently in relation to them
"the authority of the State is complete, unqualified
"and exclusive."

In Cooley *v.* Board of Wardens, 12 How. 326, the Court, speaking of the power of Congress to regulate commerce say, that their power "does not necessari-
"ly, or even materially, extend to the means of pre-
"caution or safety adopted within the waters or lim-
"its of the State, by the authority of the latter for
"the *preservation of the vessels and cargoes and the*
"*navigators and passengers.* These last subjects
"are essentially local. They must depend upon
"local necessities which call them into existence."

In steamboat "New York" *v.* Rea. 18 How., 226, Mr. Justice Nelson, after stating the powers of the Federal Government and its Courts, says, "We
"agree, an exception to this general principal, is
"the regulation of steamboats and other water craft

"in the ports and harbors of the States, which is re-
"quired for the accommodation and safety of ves-
"sels resorting thither in the pursuits of business
"and commerce. These are *police regulations* in
"aid and furtherance of commerce, enacted by the
"local authorities, who have a knowledge of the
"wants of the locality, and a deep interest in pro-
"perly providing for them."

In the owners of Brig Gray *v.* owners of Ship Fraser, 21 How., 187, the question of validity of ordinances of the City of Charleston, prescribing place and time of the anchorage of vessels in the harbor, and lights to be borne, arose. Mr. Chief Justice Taney delivering the opinion of the Court upon the questions of validity, said, "the powers of the city "authorities to pass and enforce these two ordin-"ances is disputed by the libellants. But regula-"tions of this kind are necessary and indispensable "in every commercial port, for the convenience and "safety of commerce. And the local authorities "have a right to prescribe *at what wharf a vessel* "*may lie, and how long she may remain there,* "*where she may unload or take on board part-*"*icular cargoes, where she may anchor in the* "*harbor and for what time and what* description "of light she shall display at night to warn the "passing vessels of her position, and that she "is at anchor, and not under sail. They "are like to the local usages of navigation in "different ports, and every vessel, from whatever "part of the world she may come, is bound to take "notice of them and conform to them. And there "is nothing in the regulations referred to in the port "of Charleston which is in conflict with any law of "Congress regulating commerce, or with the general "admiralty jurisdiction conferred on the Courts of "the United States." And the three eminent Justices, who dissented from the general opinion, limited their dissent in a manner justifying the belief, that they in no wise differed from the principle enunciated in the quotation above.

Second. The statute in question should be considered in connection with the locality to which it applies, the exigencies for its existence, and the peculiarities of its origin and history, in order to ascertain the precise intent of the State Legislature.

The Port of New York is the chief commercial centre of the sea board. Commerce flows to it in such volume and force, that without local regulation it would become confused and self-destructive. The wharves of the port are private property belonging to the city corporation or to individuals, and at these all articles of commercial interchange must be landed. Over this portion of the soil of the State of New York, it is apprehended, Congress, under its power to regulate commerce, would hesitate in exercising the right of eminent domain, and without the application of that supreme power vested idividual interests, would form a barrier to the ready distribution of merchandise. These interests are easily subordinated to State police control. They fall in line with the mass of domestic matters constantly demanding local care and often requiring modifications of the rules under which they are brought into harmony with general business operations. They can everywhere be better and more satisfactorily managed by local than National authority. The geographical condition of the city of New York is an element of difficulty in arranging shipping. The great body of commerce settles upon its smaller part. Here traffic from the far West vies with that from Asia in its desire for early attention. Hence the officer upon whom the duty of regulating assignments of place devolves, gains strength and support by his local affinities. The corporation of the city assists him, the wharf owners afford an habitual aid. Necessities for accommodation arise that may nowhere else exist, and which no general law operating throughout the States could meet. All ports have regulations peculiar to their localities. Those of Quarantine vary, and in like manner those of police must vary with the locality, the habit of the people, the exigencies of climate and season.

The origin of the "Harbor Master" is ancient, and it is found that within a few years after the adoption of the Constitution, in the State where many of its ablest framers and expounders swayed great political power, the Act of 1796, referred to above, came into being. This is stated to illustrate the purpose of the statute, that it was not intended to be other than the exercise of a police power resting with the State and in no wise an interference with commerce, or with any right exclusively vested in Congress.

This view of the statute was maintained by the Supreme Court, of the State of New York, as early as 1827. In Vanderbilt *v.* Adams, 7 Cow., 349.

Curia per Woodward, *J.*, say, in considering the "Harbor Master's Statute" of 1824, conferring the same powers as the one here in question: "The "statute in question was passed for the preservation "of good order in the harbor. It appears to be a "necessary police regulation and not void, although "it may, in some measure, interfere with individual "rights, * * * The Harbor Master had juris- "diction, under the act, over all private wharves. "They were subject to all police regulations. It "seems to me that the power exercised in this case "is essentially necessary for the purpose of protect- "ing the rights of all concerned. It is not in the "legitimate sense of the term a violation of any "right, but the exercise of a power indispensably "necessary where an extensive commerce is carried "on."

See also Benedict *v.* Vandervilt, 1 Rob't., N. Y. Sup. Ct., 194.

And as to exercise of power of "eminent domain" in this connection.

United States *v.* Bridge Co., 6 M. Lean. 517.

II.

The control by a State of its internal affairs, with a view to the maintenance of order and public safety, is not an infringement of the powers of Congress to regulate commerce, although it may affect the subjects or instruments of commerce, but is the exercise of a power reserved to the State, and without which it could not exist.

Our system of government presents some perplexities, and prominent among these, is the question of the respective rights and powers of the State and national authority. This becomes more apparent in the matter of regulating commerce than in other grants of power. If we extend commerce to its ultimate definition, even under the short section of the Constitution, providing for its regulation, it would become the proper subject of federal legislation to a degree that would compel the surrender of all substantial State powers. Such was not the design of the Constitution. On the contrary, it was intended, upon a broad principle, to confer upon Congress the power to make those general and fundamental regulations easily adapted to the country at large, and befitting its dignity in relation to foreign powers, and to leave to the States such essential control as to minor matters concerning their internal or territorial interests that would best preserve popular order, security and prosperity. Any other view would obliterate State governments. If the national authority touched traffic at every step, it would embrace it from production to consumption. It would necessarily bring the citizen under absolute control so far as he might be concerned in or affected by traffic, and the States would be left as forms of government, but barren of the most essential sovereign powers. So largely has foreign and inter-state commerce entered into the every day condition of our people that this result would be unavoidable.

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No such construction has been advanced in the courts. The limit of the exercise of national power seems coincident with what on the side of the States may be termed its right of prohibition. When State action reaches a point of arrest upon foreign or interstate commerce, national authority is instantly and properly exercised. Up to that line, it either tolerates State legislation or is considered as powerless to interfere with it.

Such, it is respectfully submitted, has been the view of this Court in Brown *vs.* Maryland, in the license cases, the cases affecting the sale of alcoholic liquors, and the case of

United States *v.* Dewitt. 9 Wall., 41.

The power of a government to preserve itself is inherent and not the subject of grant or delegation, and the control of the internal affairs of a State belongs to this indefeasible power.

There can be no branch of these State powers more important to New York than that of the police of its great harbor and city, and of that police, not the least essential to good order and security, both of person and property, is the body of harbor masters. The pilot is scarcely more important to the safety of the vessel than the harbor master. The latter, in fact, supplements the former. He takes the vessel in charge when the pilot leaves, selects a proper anchorage, assigns a proper and safe berth, looks to it that contending vessels do not so interfere as to cause damage, and restrains the wharf owner from injurious action.

It is no answer to this, that the Harbor Master does not in every instance render personal or direct service; no more does the street policeman. In each, however, a general service is constantly rendered. The official existence is in itself a benefit. The knowledge that an organization empowered to preserve

order is ever at hand to assert its power and correct wrongs, operates as a check upon them.

Cooley *v.* Board of Wardens, 12 How., 314.
Port Wardens *v.* Ship M. J. Ward, 14 La., 293.
Steamship Co. *v.* Jolliffe, 2 Wall., 450.

III.

Although the Harbor Masters' Act has not in terms been directly sanctioned by Congress, yet it has long been recognized, so far as the collection of fees under it by the Collector of the Port of New York, for the benefit of the Harbor Masters, affords recognition.

The Act has been the subject of Congressional inquiry and approval, so far as non-interference after investigation into its features, gives approval.

See Act 1799, Brightley's Dig., vol. 1, § 118.
Rev. Stat. U. S., § 4206.
House of Representatives, Ex. Doc. No. 169, 2d Sess. 41st Con.

The action of the House of Representatives grew out of the case of Steamship *v.* Master and Wardens, 6 Wall., and was in form of a resolution calling upon the Secretary of Treasury to inform the House why the Collector of the Port of New York was permitted, among other things, to collect Harbor Masters' fees, when such fees had been declared illegal by a decision of the Supreme Court. The Secretary answered by an opinion from the Solicitor of the Treasury, distinguishing the Harbor Masters from Master and Wardens, and obviously satisfying the House, as no other step seems to have been taken.

The Collector of the Port now and heretofore has collected these fees as part of the port charges of the Port.

IV.

The attachment alleged in the bill of complaint as a liability incurred by the plaintiff, is simply the process of foreign attachment, and not springing from any lien imposed by the laws of New York upon vessels for the fees in question. The penalties are collectable in the same manner as any other pecuniary claim, and in the same tribunals. There is no hardship in the mode of collection.

V.

The adaptation of the fees to a standard of tonnage is the most just and convenient method of measuring them, and not in conflict with the prohibition of the Constitution. The act does not lay a duty of tonnage.

It is submitted that the statute, however subject to mere verbal criticism, intends no such purpose or effect as a "duty of tonnage" in the Constitutional sense. Duty of tonnage was well understood by the framers of the Constitution. It had a history that stirred the feelings as well as the understanding of the founders of the Republic. It was a tax upon commerce through its most important vehicle. A tax levied originally for the crown revenues and without regard to service or benefit in return. It had been a subject of violent political discussion through the reigns of many sovereigns of the mother country, and contributed to the dethronement and execution of one. As commerce amplified it was more carefully studied, and when the Constitution was adopted it was as thoroughly understood as was any of its subjects. It was not in the nature of a port charge, as these fees are,

or as pilot fees are. It was a tax for purposes of revenue for the general government of the State, not a fee in compensation of special port privileges and protection.

The case in 6 Wall., 31, is not parallel. There the Master and Wardens were a mere body of "*official witnesses.*" They had no powers except to *testify*, they could look into the stowage of a vessel and swear to its character, but they could do nothing else. They were imposed upon Commerce for no other purpose than to aid in personal disputes by testimony. They could not remove a ship or assign it a berth, and after qualifying themselves for their functions as witnesses, and being paid for it the sum of two dollars, were allowed to charge every vessel five dollars, whether they rendered any services or not. In the same city, under a law of the State, passed the same year as that creating or regulating the Master and Wardens, Harbor Masters are found with powers precisely similar to those in New York, fees regulated in the same way. These two bodies are clearly distinguishable—the Warden is only a witness, the Harbor Master is a port officer. The Warden is perhaps better than the stevedore in this, that he is presumed to be impartial, while the stevedore, receiving pay from the shipowner for discharging, is subject to this slight burden of interest. The Warden's duty, however, is not superior to the stevedore's; each looks to storage.

There is no analogy between these officials, the wardens and harbor masters.

The allegation in the bill, that fees are exacted whether services are rendered or not, has been briefly considered in the statement. Upon a demurrer we have no evidence, but the Act made part of the bill bears testimony enough to the services of the Harbor Masters, while the alternative method of

pleading admits services. It will not be denied that these port officers are of inestimable value, and that commerce would be subjected to most serious losses without them. The Port Warden could be dispensed with, and his province supplied by other witnesses, but the pilot and harbor masters are essential.

In Hackley *v.* Geraghty, 34 N. J., 332. the Court was led into the error of supposing the Harbor Master's Act of Louisiana to have been under consideration, in Steamship Co. *v.* Master and Wardens, 6 Wall., and not the Master and Warden's Acts. As the Acts are shown to be distinct, for different purposes and with altogether different effects, and the Master and Warden's Act alone considered by this Court, the case in 34th N. J. seems inapplicable as authority.

Certainly the principle upon which Cooley *v.* The Wardens turned, still supports the system of pilotage fees, and is in all respects applicable to Harbor Master's fees. The technical language of the statute is not so much to be regarded as its purpose and effect. If the owners of vessels were required to pay fees proportioned upon their length, instead of upon their tonnage, for the port services rendered by the Harbor Master, it could hardly be considered as a duty of tonnage.

This case is unlike the "tonnage cases." There a tax was levied directly upon the vessels, and no return or equivalent afforded. Here the owner of vessels secures a full and rich reward for the fees he pays, his property is carefully guarded, and his pursuit aided. He is sure of skilled and competent official assistance, in promoting his ventures; certain of a berth for the discharge and receipt of cargo, and free from collision or embarrassment while in possession of his berth. He is aided and shielded by an organ-

ization in full sympathy with surrounding individual and governmental forces, whose members are animated by local attachment as well as national pride: an organization always alert, with known districts and defined quarters.

The appellant's steamships *make fast to the wharves and load and unload each time they enter the port* (fol. 6 of Record). *Assuredly service is rendered at each of these acts, by the existence of the body of Harbor Masters*, if they do no manual labor or give no personal direction. This is so with every police body, indeed with every organization having powers of control. It is the purpose of enlightened government from its loftiest to its lowest form.

VI.

The rendering of service has in some instances been considered as sufficient to characterize the compensation rated upon tonnage and withdraw it from the sweep of the prohibition against "duty of tonnage." These instances must be special and few, for it is clear that no State law imposing what was meant by *duty of tonnage*, could be sustained simply upon the ground it coupled services with the tax. This is by no means contended here. On the contrary, the contention is, that the fees imposed are merely compensatory for port services, existed in form at the adoption of the Constitution, and in no way belong to the class of charges that have been or should be regarded as duties of tonnage.

This view is in harmony with certain cases upon this subject.

In Sheffield *v.* Parson, 3 Stewart & Porter, 302. *The ship against which the charge was made, was*

at no time within the corporate limits of Mobile, nor made fast to the wharves.

Even then the Court say, "compensation charge-
" able against the commanders or consignees of ves-
" entering the port for particular services, necessarily
" rendered, or specially requested, should be
" viewed in a different light.

In Alexander, *v.* Railroad Co., 3, Stwt, 599. The Court say, "it is said the imposition of tonnage in
" this case is merely a mode by which the plaintiff
" is to ascertain his fees. I should think there
" would be great force in this view if it were so the
" Harbor Master rendered any services for the de-
" fendant. If he assigned their packets a berth,
" or did any other personal service for them, I should
" be disposed to say that measuring the value of his
" services by the tonnage of the ship would not
" make the law allowing him compensation uncon-
stitutional."

In the State Tonage tax cases, 12 Wall., 220, the eminent Justice, expressing the opinion of the Court, says: "Beyond question the act is an act to raise
" revenue without any corresponding or equivalent
" benefit or advantage to the vessels taxed, or to the
" shipowners, and consequently it *cannot be upheld*
" *by virtue of the rules applied in the construction*
" *of laws regulating pilot dues and port charges.*"

In Cannon *v.* New Orleans, 20 Wall., 577, the tax was imposed for stopping anywhere in the port, and entirely unlike the fees in this case.

It is submitted that the fees under discussion are not, in their nature or the intent of the State legisla-

tion, a duty of tonnage, and that services are always rendered by the readiness to perform them.

See further, Thomson *v.* Pacific Railroad, 9 Wall., 579.
National Bank *v.* Commonwealth, 9 Wall., 353.

VII.

The decree of the Circuit Court should be affirmed.

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Of Counsel for Appellees.